Supreme Court, U.S.
FILED

No. 06- 061087 FEB 01 2007

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IN THE

Supreme Court of the United States

PETER LUKS,

Petitioner,

v.

BAXTER HEALTHCARE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Under the Age Discrimination in Employment Act, is an admission from the employer that the adverse employment action is based on age required to support the inference of age discrimination under both the direct and the circumstantial methods of proof in order for the employee to survive summary judgment.

(2) Must a court ruling on an employer's motion for summary judgment under Fed. R. Civ. P. 56 in an age discrimination case view the evidence in the light most favorable to the employee.

(3) Under the Age Discrimination in Employment Act, is evidence that each and every individual involved in the decision-making process had a discriminatory motive required to prove that the employer's reason for the adverse employment action was a pretext for discrimination.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Peter Luks, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 3, 2006, in order to bring the opinion of the Court of Appeals into conformance with this Court's well-established standards for the granting of summary judgment in favor of the employer in employment discrimination cases.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Luks v. Baxter Healthcare Corp.*, 467 F.3d 1049 (7th Cir, 2006) (App. A). The Seventh Circuit affirmed the August 29, 2005 decision of the United States District Court for the Northern District of Illinois, which was not reported. (App. B).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Seventh Circuit's opinion was rendered on November 3, 2006. No petition for rehearing was filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a) provides, in pertinent part: "It shall be unlawful for an employer ... to discharge any individual or otherwise discriminate against any individual ... because of such individual's age."

Federal Rule of Civil Procedure 56 provides, in pertinent part: Summary Judgment ...

(c) Motion and Proceedings Thereon. ... The judgment sought shall be rendered forthwith if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

Petitioner, Peter Luks (hereinafter "Luks"), was employed by Respondent Baxter Healthcare Corporation (hereinafter "Baxter") for nearly twenty years from September, 1982 through May 3, 2002. His last position held was Senior Business Consultant. On May 3, 2002, Baxter terminated Luks for alleged poor work performance. Luks subsequently filed a Charge of Discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC") alleging age discrimination. On April 26, 2004, following the issuance of a probable cause determination and a Notice of Right to Sue by the EEOC, Luks filed his Complaint against Baxter in the District Court.

Luks' Complaint alleges disparate treatment in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq*. Specifically, Luks alleges that he was subjected to a series of adverse employment actions, including (a) negative employment evaluations; (b) initiation of a 30-day "Performance Plan" on March 26, 2002; and (c) termination on May 3, 2002.

Jurisdiction of this action was conferred upon the United States District Court for the Northern District of Illinois, Eastern Division (hereinafter "district court") pursuant to the ADEA and 28 U.S.C. § 1331.

On May 16, 2005, after the close of discovery, Baxter filed its Motion for Summary Judgment. On August 31, 2005, the district court entered its Order granting summary judgment in favor of Baxter. No motions were filed after the district court's order was entered. Luks filed a timely Notice of Appeal on September 28, 2005. On November 3, 2006, the Seventh Circuit

affirmed the August 29, 2005 decision of the district court. (App. A). No petition for rehearing was filed.

B. LUKS' EVIDENCE OF AGE DISCRIMINATION

1. *Background*

Luks was employed at Baxter from September, 1982 through May 2, 2002; His last position was Senior Business Systems Consultant. App. 2a, 5a.[1] At the time of his termination, Luks was 52 years old. App. 2a. Throughout the 18 years of his employment with Baxter prior to his tenure under John Goode[2], Vice President of Architecture, Technology and Planning, Luks received multiple promotions and raises. PF ¶4 (Ex. V[3], Luks Aff. ¶ 1; Ex. I, Luks Dep. Ex. 1). At no time during this 18 year period did Luks receive a review indicating that he had not met Baxter's overall expectations. PF ¶¶5-6 (Ex. V, Luks Aff. ¶ 2); Resp. ¶¶4-10 (Exs. N, O, P, Q and S, Luks Dep. Exs. 13, 14, 15, 17 and 10, respectively). At his first opportunity to review Luks' performance, Goode evaluated him negatively. App. 2a.

After working directly under Goode from August 2000 through March, 2001, Luks was instructed by Goode to report to the newly hired Director of the Program Office, Carol Kazl, who in turn reported to Goode. App. 2a. Others in the Program Office included Terri Stevens and Nathan Habeck, who assumed Luks duties following his termination. App. 5a. As a Senior Business Consultant, Luks was responsible for developing and assisting in the implementation of a prioritization process. App. 2a.

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[1] Petitioner has cited the Seventh Circuit opinion for facts acknowledged by the court.

[2] Goode began working at Baxter in August, 2000. App. 2a.

[3] Lettered Exhibits are references to the Appendix to Luks' Local Rule 56.1 Response to Defendant's Statement of Material Facts and Additional Uncontroverted Material Facts. Descriptions of the material contained in the lettered exhibits follows the exhibit reference (i.e., "Ex. I, Luks Dep. Ex. 1")

Luks was first evaluated by Kazl five months after he began working for her. App. 2a. She gave him an overall "meets expectations" rating at that time, but had several alleged criticisms of his performance. App. 2a, 3a. This was the first time that Luks became aware of any alleged issues with regard to his performance in the Program Office. PF ¶22 (Ex. E, Luks Dep., p. 40, l. 6 – p. 41, l. 25.; Ex. B, Goode Dep., p. 51, ll. 9-12; Goode Dep., p. 44, ll. 1-10).; PF ¶25 (Ex. E, Luks Dep., p. 56, ll. 4-22).

2. *Targeting of the Three Oldest Employees, in Goode's Department, Including Luks.*

a. Overby's Testimony

Cynthia Overby, who was the Manager of Web Services, reported directly to Goode. App. 7a; PF ¶79 (Ex. F, Overby Dep., p. 9, ll. 14-22). Overby was the direct supervisor of Larry Helsith and Glen Jurmann. App. 7a. At all relevant times, Helsith, Jurmann, and Luks were the three oldest employees in Goode's Architecture Technology and Planning Department and were all over the age of 50. App. 10a; PF ¶83 (Ex. E, Luks Dep., p. 237, l. 11 – p. 238, l. 19; Ex. B, Goode Dep., p. 203, l. 5 – p. 206, l. 1).

In late 2001 or early 2002, Overby had a meeting with Goode in which he expressed concern about the respective performances of Helsith and Jurmann. App. 7a. Overby disagreed with Goode's assessment of Helsith and Jurmann's performance. App. 7a, 8a. This meeting was not the first occasion on which Goode criticized Helsith's and Jurmann's performance. PF ¶82 (Ex. F, Overby Dep., p. 15, ll. 11-24). Overby thought Helsith was doing an above-average job. App. 8a. Overby told Goode she disagreed with his assessment of Helsith. Goode asked her what she was going to do to show him his assessment of Helsith was wrong. PF ¶85 (Ex. F, Overby Dep., p. 16, l. 18 – p. 17, l. 17). She told him he would just have to trust her judgment, and that Helsith's good performance was documented. PF ¶85. (Ex. F, Overby Dep., p. 16, l. 18 – p. 17, l. 17).

Overby felt Goode was trying to set Helsith up for failure. App. 8a. Because of her concerns, Overby provided documentation to Gretchen Nester, Director of Human Resources at Baxter, showing Helsith's good performance. *Id.* Overby was concerned that Goode might try to change the performance reviews negatively. PF ¶87 (Ex. F, Overby Dep., p. 17, l. 14 – p. 18, l. 20). When Goode learned that Overby had delivered the performance appraisals directly to Nester, he fired her. App. 8a.

After the meeting in late 2001-early 2002, Goode directed Overby to put Helsith on a performance plan. PF ¶89 (Ex. F, Overby Dep., p. 23, ll. 15-20). Overby also disagreed with the decision to place Helsith on a performance plan. PF ¶90 (Ex. F, Overby Dep., p. 23, ll. 15-23). App. 8a. Overby thought Nester and Goode were trying to fabricate a basis for terminating Helsith. PF ¶92 (Ex. F, Overby Dep., p. 25, ll. 9-15). After Helsith had been placed on the plan, Goode became upset that Helsith was meeting expectations and expressed a desire that Overby speed up the process of obtaining a factual basis for terminating Helsith. PF ¶93 (Ex. F, Overby Dep., p. 26, l. 2 – p. 27, l. 5). Helsith was subsequently terminated as a part of a "reduction in force." App. 8a.

Approximately one-month after Goode instructed Overby to put Helsith on a performance plan he directed Overby to put Jurmann on a performance plan. PF ¶95 (Ex. F, Overby Dep., p. 27, ll. 3-12). Overby told Goode that Jurmann's performance was excellent, and that she did not want to follow his directive. PF ¶96 (Ex. F, Overby Dep., p. 33, l. 24 – p. 34, l. 2). Goode responded by stating that Jurmann did not know what he was doing. PF ¶97 (Ex. F, Overby Dep., p. 27, ll. 16-22). He told her if she would not put him on a performance plan, she should find a position for him in another department, which she did. App. 8a.

In November 2001, Overby met with Kazl to discuss several projects. PF ¶99 (Ex. F, Overby Dep., p. 41, l. 16 – p. 42, l. 2).

During the meeting, Kazl told Overby that she had been instructed by Goode to put a performance plan together for Luks. PF ¶99 (Ex. F, Overby Dep., p. 41, ll. 11-15). Kazl told Overby that she was "extremely frustrated" with her efforts to develop the performance plan for Luks. App. 9a. Kazl stated that she was not quite sure what "they" wanted. *Id.* Overby had worked with Luks and had a favorable impression of his skills. App. 9a. Overby believed that, like Helsith and Jurmann, Luks was being set up for discharge. *Id.*

b. Documentation

There are three documents in the record, two of which can be tied directly to Goode, referencing Luks, Jurmann and Helsith; at least two of these are related to potential performance plans. App. 8a, 9a. The first is a document identified by Overby. During her meeting with Goode concerning Goode's dissatisfaction with Jurmann and Helsith, Goode had a document with Jurmann's Helsith's and Luks' names on it. App. 8a.

When Kazl first became Luks' supervisor, she questioned Luks about a document contained in his personnel file that listed Luks, Helsith and Jurmann. App. 8a. It appeared to be some sort of blank performance plan. *Id.* Kazl returned Luks' personnel file to Human Resources with the document. *Id.* When Luks reviewed his personnel file days later, the document was missing. *Id.*

A third document, a blank "Performance Objective Template," dated February 8, 2001, also listed Luks, Helsith and Jurmann. App. 9a. Handwritten notes at the bottom of this document indicate that someone had a meeting with Goode regarding Goode's future efforts to document performance issues with respect to Luks. *Id.* It was at this time that Goode began keeping a log of "issues" concerning Luks. *Id.* This was prior to Kazl's employment with Baxter.

c. *Goode's Comments*

Goode told Overby that he wanted to get rid of the "good old boys," and that he wanted the "good old boys club" gone. App. 11a. He also stated that he wanted "high-energy" employees. *Id*. Jurmann and Helsith reported to Nester that Goode had made similar "unprofessional" comments directly to them, referring to them as "old timers." App. 11a. With regard to Luks specifically, in May, 2002, Baxter hired a new secretary. Goode introduced Luks to her as the "old guy" in the department within days of Luks's termination App. 11a.

3. *Additional Evidence of Discrimination and Pretext in That Baxter's Performance Expectations Were Not Legitimate.*

i. The 2001 Year-End Review

At the end of January 2002, Luks was presented with his 2001 year-end review in a meeting with Kazl. Luks was given an overall "does not meet" expectations evaluation. PF ¶ 27 (Ex. E, Luks Dep., p. 56, l. 23 – p. 57, l. 2; p. 58, ll. 20-23). The majority of the 2001 year-end review observation points were factually incorrect or without factual foundation. PF ¶ 28 (Ex. E, Luks Dep., p. 122, l. 8 – p. 123, l. 3; p. 130, ll. 6-21; Ex. L, Luks Dep. Ex. 10). Luks expressed his concerns regarding the inaccuracies to Kazl, but she refused to listen to Luks' concerns. PF ¶ 32 (Ex. E, Luks Dep., p. 59, l. 23 – p. 60, l. 16).

Kazl criticized Luks for not providing sufficiently regular status reports. PF ¶ 33 (Ex. J, Luks Dep. Ex. 5). However, on those occasions when a status report was not provided, Kazl had given Luks permission to defer the status report. PF ¶ 33 (Ex. E, Luks Dep., p. 61, l. 13 – p. 63, l. 21). Kazl also criticized Luks for not developing sufficient metrics for the prioritization process.[4] PF ¶ 34 (Ex. E, Luks Dep., p. 69, ll. 4-18; Ex. J, Luks

[4] Metrics is the term used by Baxter employees to describe graphs/tables/charts that measure the effectiveness of a particular project or program.

Dep. Ex. 5). Kazl never gave Luks "any definition" as to what metrics she was seeking and she "never got to the point where she defined it". Resp. ¶ 40 (Ex. E, Luks Dep., p. 70, l. 22 – p. 71, l. 13). At the time of the review, Luks had already developed a significant number of metrics and they had been posted on the web. PF ¶ 34 (Ex. E, Luks Dep., p. 69, l. 19 – p. 70, l. 2). Luks told Kazl that the metrics existed during the 2001 year-end review, but she did not acknowledge that the metrics existed. PF ¶ 34 (Ex. E, Luks Dep., p. 69, l. 19 – p. 70, l. 2). Luks suggested that she look on the website to confirm that the metrics existed. PF ¶ 34 (Ex. E, Luks Dep., p. 72, l. 14 – p. 73, l. 4). He offered to go to his office to get some of the metrics he had developed but Kazl did not want him to do so. PF ¶ 34 (Ex. E, Luks Dep., p. 72, l. 14 – p. 73, l. 4). Habeck testified he recalled that he and Luks worked together to create at least ten different metrics reflecting the effectiveness of the prioritization process. PF ¶ 34 (Ex. C, Habeck Dep., p. 52, l. 8 – p. 53, l. 6).

Kazl further criticized Luks suggesting that although different reports were prepared, prodding was required to get Luks to complete them. PF ¶ 35 (Ex. E, Luks Dep., p. 75, l. 14 – p. 76, l. 3; Ex. J, Luks Dep. Ex. 5). Kazl could not provide him with an example. PF ¶ 35 (Ex. E, Luks Dep., p. 76, ll. 4-11).

In addition, Kazl criticized Luks for not updating the prioritization process website on a weekly basis. PF ¶ 36 (Ex. E, Luks Dep., p. 76, l. 12 – p. 77, l. 13). There was hard data saved on back-up CDs showing the data Luks had entered on the web-site. PF ¶ 36 (Ex. E, Luks Dep., p. 76, l. 16 – p. 77, l. 13). Luks told Kazl at the 2001 year-end review meeting that there was hard data, which refuted her assertion. PF ¶ 36 (Ex. E, Luks Dep., p. 77, l. 14 – p. 78, l. 21). Kazl did not want to see the data. PF ¶ 36 (Ex. E, Luks Dep., p. 77, l. 14 – p. 78, l. 21). Kazl could only recall one incident where a customer complained that the database had not been updated and when the need for updates was brought to Luks' attention, the database

was updated. PF ¶ 36 (Ex. D, Kazl Dep., p. 48, l. 2 – p. 50, l. 5). Kazl testified that she did not know how Luks failed to update the database in a timely manner, and that in order to know, she would have had to review the database on a weekly basis, yet she did not do so. PF ¶ 36 (Ex. D, Kazl Dep., p. 58, ll. 5-13).

Kazl also criticized Luks for not performing sufficient follow-up to finalize the category-owner reports. PF ¶ 37 (Ex. E, Luks Dep., p. 81, l. 7 – p. 82, l. 6; Ex. J, Luks Dep. Ex. 5). Luks had already performed the necessary follow-up with the team leads. PF ¶ 37 (Ex. E, Luks Dep., p. 82, l. 11 – p. 83, l. 5). Kazl agreed that the follow-up had been performed, but when Luks asked Kazl to change the review to reflect this, Kazl refused to change it. PF ¶ 37 (Ex. E, Luks Dep., p. 83, l. 6 – p. 84, l. 23).

Luks subsequently met with Goode to discuss the review. App. 4a. Luks told Goode that he felt Kazl's review was based upon inaccurate information. *Id*. Luks provided Goode with several examples of inaccuracies. PF ¶ 38 (Ex. E, Luks Dep., p. 122, l. 8 – p. 124, l. 23). Luks asked that Goode arrange a meeting between Luks, Goode, and Kazl, but Goode refused. PF ¶ 38 (Ex. E, Luks Dep., p. 80, l. 11 – p. 81, l. 6). Goode's response was that the performance review was "not a big deal"; he specifically advised Luks not to complain to Human Resources. PF ¶ 38 (Ex. E, Luks Dep., p. 124, l. 24 – p. 125, l. 17; p. 128, ll. 11-17).

ii. The Performance Plan

Two months after the review, Luks was placed on a performance plan. PF ¶ 39 (Ex. E, Luks Dep., p. 132, l. 19 – p. 133, l. 1). The plan contained 23 "observations" of purported failures of Luks' performance. PF ¶ 39 (Ex. K, Luks Dep. Ex. 9). Based on the observations, 28 goals tied to ameliorating performance related to the observation items were established. App. 4a. The performance plan was for 30 days; if Luks did not meet the performance goals at the end of 30 days, Luks would be terminated. PF ¶ 39 (Ex. E, Luks Dep., p. 194, ll. 12-15). According to Goode, the performance plan established for Luks

was "rigorous". PF ¶ 39 (Ex. B, Goode Dep., p. 55, l. 22 – p. 56, l. 3). Goode "coached" Kazl through the process of developing Luks' performance plan. App. 12a; PF ¶ 39 (Ex. B, Goode Dep., p. 58, ll. 4-23); DF ¶¶33, 50, 51, 71.

The plan observation items were in large part: (1) factually incorrect, (2) exhibited a lack of understanding of Luks' role in the Program Management Office or, (3) when pressed for details to back-up the generalized statements contained in the observation items, Kazl could not come forward with examples to support her assertions. PF ¶ 40 (Ex. E, Luks Dep., p. 194, ll. 4-11; Ex. K, Luks Dep. Ex. 9; Ex. L, Luks Dep. Ex. 10).

During the performance plan meeting with Kazl, Luks expressed his general factual disagreement with many of the observation items. PF ¶ 41 (Ex. E, Luks Dep., p. 133, l. 12 – p. 134, l. 24). Luks took the performance review home, reviewed it, and made a list of comments responding to the 23 "observations." PF ¶ 41 (Ex. E, Luks Dep., p. 136, l. 11 – p. 138, l. 9). A second meeting with respect to the performance plan was held between Luks and Kazl. PF ¶ 42 (Ex. E, Luks Dep., p. 137, l. 7 – p. 138, l. 5). Luks addressed how each one of the 23 "observations" was (a) factually incorrect or moot. PF ¶ 42 (Ex. E, Luks Dep., p. 137, l. 11 – p. 138, l. 9; p. 194, ll. 4-11). Kazl was not concerned and corrected nothing. PF ¶ 42 (Ex. E, Luks Dep., p. 137, l. 11 – p. 138, l. 9).

Examples of inaccuracies include the following: Kazl's Observation No. 1 was that since his 2001 year-end review, Luks had made no attempt to contact customers. PF ¶ 43 (Ex. K, Luks Dep. Ex. 9). By going through his notes Luks was able to establish that since his 2001 year-end review he had met with Christian Delkoenig, John Cheshire, Jeremy Schwarts, Rose Lim, Jim Staziak, Greg Larsen, and Maryann Kraemer. PF ¶ 43 (Ex. E, Luks Dep., p. 138, l. 16 – p. 139, l. 21; Ex. K, Luks Dep. Ex. 9; Ex. L, Luks Dep. Ex. 10). These were not the only customers he had contacted since his 2001 year-end review. After compiling this list, Luks felt confident he had constructed

a sufficient list to exhibit the lack of accuracy of Kazl's assertion. PF ¶ 43 (Ex. E, Luks Dep., p. 138, l. 16 – p. 139, l. 21). Kazl acknowledged that Luks had contacted these customers, but suggested that there were others that Luks still had not contacted. PF ¶ 43 (Ex. E, Luks Dep., p. 140, l. 15 – p. 141, l. 3). When Luks asked which customers, Kazl could not provide him with names. PF ¶ 43 (Ex. E, Luks Dep., p. 141, l. 8 – p. 142, l. 17).

Kazl's Observation No. 5 was that there were changes that were requested by Cynthia Overby and John Pascella to the PDF Form that had not been made. PF ¶ 44 (Ex. E, Luks Dep., Ex. 9; Ex. E, Luks Dep., p. 150, ll. 7-21). However, the requested change to the form had been made. PF ¶ 44 (Ex. E, Luks Dep., p. 150, ll. 7-21). When Luks asked Kazl to remove the comment from the performance plan, Kazl refused. PF ¶ 44 (Ex. E, Luks Dep., p. 150, ll. 7-21). Kazl's observation No. 6 was that a CPA checklist was not developed until the idea was proposed by Andrea Davis. PF ¶ 45 (Ex. E, Luks Dep., p. 155, ll. 6-19; Ex. K, Luks Dep. Ex. 9). However, a Baxter customer would not expect a project to be completed before making a "project request". PF ¶ 45 (Ex. E, Luks Dep., p. 155, l. 6 – p. 157, l. 5). As soon as a project request was made, Luks began developing the CPA checklist. PF ¶ 45 (Ex. E, Luks Dep., p. 152, l. 17 – p. 155, l. 22).

Kazl's Observation No. 7 was that Luks needed to better define for Team Leads what were day-to-day activities versus planned support or planned initiatives. PF ¶ 46 (Luks Dep. Ex. 9; Ex. E, Luks Dep., p. 157, ll. 3-19). However, prior to his review, Luks had created a PowerPoint slide explaining to team leads what activities fell into each of the above categories and the slide had been placed on the Baxter internet website for Team Lead use. PF ¶ 46 (Ex. E, Luks Dep., p. 157, ll. 3-19).

Kazl's Observation Nos. 15, 16 and 19 all included projects she contended Luks had not completed. PF ¶ 47 (Ex. K, Luks Dep. Ex. 9). Specifically those observations were: (15) establish a trigger for changes in world events to rescore projects,

(16) meeting with Goode and Monteleone regarding merging absolutes and planned initiatives, and (19) need to follow-up with Privoznik, Sanders and Glas on their offers to help develop the prioritization process. PF ¶ 47 (Ex. K, Luks Dep. Ex. 9). In each case, the purportedly unfinished task had already been successfully completed or the required meetings had already been set. PF ¶ 47 (Ex. E, Luks Dep., p. 175, l, 14 – p. 178, l. 9; p. 178, ll. 10-19; p. 178, l. 23 – p. 179, l. 9).

Within a few days after the performance plan meeting with Kazl, Luks met with Goode. PF ¶ 49 (Ex. E, Luks Dep., p. 191, ll. 15-23). Luks told Goode he had concerns regarding the performance plan and read Goode a prepared statement in which he stated that he felt that Kazl was "twisting the truth" and trying to "build a case" for his termination. PF ¶ 49 (Ex. E, Luks Dep., p. 192, ll. 3-21; Ex. U, Luks Dep. Ex. 7). He expressed that a variety of the observations in the performance plan were factually inaccurate, and he asked to be removed from the performance plan. PF ¶ 49 (Ex. E, Luks Dep., p. 192, ll. 3-21; Ex. U, Luks Dep. Ex. 7). Luks provided Goode with a summary of his responses to the observations in the performance plan; Goode ignored them. PF ¶ 49 (Ex. E, Luks Dep., p. 204, ll. 13-20).

iii. Luks' Termination

Kazl stated that she saw significant improvement during the first and second weeks that Luks was on the performance plan, but that Luks did not provide status reports "as often" during the last few weeks. DF ¶64 (Kazl Dep. p. 117-18; p. 125-27). This was one of the Luks' alleged deficiencies justifying termination. Kazl was out of the office for a substantial amount of the last two weeks of the performance plan period. Resp. ¶63 (Ex. V, Luks Aff. ¶ 11) Luks provided Kazl with status updates via E-mail in her absence. *Id*. Kazl admits that Luks provided her with status reports at least once a week during the performance plan period, which is what she ordinarily required

of her staff. PF ¶58 (Ex. D, Kazl Dep., p. 126, l. 16 – p. 127, l. 14).

On May 2, 2002, Luks was terminated in a meeting with Kazl and Nestor. App. 5a. Luks was presented with a written statement outlining Luks' purported failures to meet the performance plan. PF ¶53 (Ex. E, Luks Dep., p. 212, l. 11 – p. 213, l. 20). The written follow-up statement included substantial factual inaccuracies. PF ¶54 (Ex. E, Luks Dep., p. 214, l. 11 – p. 225, l. 11). Kazl admitted that Luks had done a good job of meeting various items in the performance plan, but stated that there were items that had not been addressed. PF ¶53 (Ex. E, Luks Dep., p. 212, l. 11 – p. 213, l. 20).

Some examples of the alleged basis for Luks' termination include that Luks had not "clearly clarified for each CIO team lead what falls into day-to-day versus plan support." PF ¶55 (Ex. E, Luks Dep., p. 216, ll. 16-21). Luks had clarified day-to-day versus planned support long before the performance plan had even been developed. PF ¶55 (Luks Dep. Ex. 9; Ex. E, Luks Dep., p. 157, ll. 3-19). This criticism is an example of an item in the performance plan that had been accomplished before the performance plan was put in place. PF ¶55 (Luks Dep. Ex. 9; Ex. E, Luks Dep., p. 157, ll. 3-19).

Kazl also asserted that she had not been seeing "[Luks] following up on making sure estimates are given back to the requestor within seven days." PF ¶57 (Ex. E, Luks Dep., p. 218, l. 13 – p. 219, l. 13). However, Luks had been providing requestors with estimates within seven days and Kazl knew that because he told her of that fact. PF ¶56 (Ex. E, Luks Dep., p. 218, l. 13 – p. 219, l. 13).

iv. Similarly Situated Employees Were Treated More Favorably

Luks was not replaced, although his position was advertised for several months following his termination. App. 5a. His responsibilities were assumed by significantly younger

employees Terri Stevens and Nathan Habeck. App. 5a, 6a. While Luks was still employed with Baxter, Nathan Habeck shared responsibility for implementing and managing the prioritization process, including developing reports and metrics, and updating the database with weekly information provided by team leads. Resp. ¶¶22-24 (Ex. C, Habeck Dep., p. 47, ll. 7-22; p. 48, l. 4 – p. 49, l. 16; p. 50, l. 3 – p. 53, l. 6).

Habeck testified that the development of metrics was a shared responsibility, and that he and Luks worked as a team in this regard. PF ¶60 (Ex. C, Habeck Dep., p. 50, l. 3 – p. 52, l. 7). Habeck never received negative comments on a review for anything he did in connection with the implementation or administration of the prioritization process, which would necessarily include the development of metrics. PF ¶60 (Ex. C, Habeck Dep., p. 62, ll. 10-22; Ex. D, Kazl Dep., p. 99, ll. 12-23).

Habeck also shared responsibility with Luks for updating the prioritization process database. PF ¶62 (Ex. C, Habeck Dep., p. 51, l. 16 – p. 52, l. 6). At some point, Luks and Habeck split the responsibility for obtaining information from the various groups. PF ¶62 (Ex. C, Habeck Dep., p. 47, ll. 7-22). Habeck recalled that on several occasions, he was unable to update the database for particular groups because the groups had failed to provide him with the required data. PF ¶62 (Ex. C, Habeck Dep., p. 48, l. 4 – p. 49, l. 16). Being unable to update a database due to a team's failure to provide the necessary data was a frequent problem for Habeck. PF ¶62 (Ex. C, Habeck Dep., p. 48, l. 4 – p. 49, l. 16). Despite the fact that Habeck and Luks shared responsibility for updating the database, Habeck was never criticized for failure to timely update the database. PF ¶62 (Ex. C, Habeck Dep., p. 49, ll. 17-21, p. 62, ll. 10-22, Ex. D, Kazl Dep., p. 99, ll. 12-23).

Baxter also failed to criticize or otherwise discipline Habeck for his failure to timely develop a method of showing the effectiveness of the prioritization process. This was one of the

items Luks was required to complete under the performance plan. PF ¶61 (Ex. D, Kazl Dep., p. 280, l. 17 – p. 281, l. 14). The failure to show the effectiveness of the prioritization process was indicated as an important factor in terminating Luks. PF ¶61 (Ex. D, Kazl Dep., p. 281, l. 15 – p. 282, l. 15). Kazl felt like giving Luks until the end of the quarter was "pushing it". PF ¶61 (Ex. D, Kazl Dep., p. 281, l. 15 – p. 282, l. 15). After Luks was terminated, Habeck assumed this responsibility. PF ¶61 (Ex. C, Habeck Dep., p. 71, ll. 9–24). When Habeck was assigned the duty of showing the effectiveness of the prioritization process, he was not given a firm deadline, "it was just a ball park thing." PF ¶61 (Ex. C, Habeck Dep., p. 72, l. 20-p. 73, l. 10). Habeck surveyed the users of the prioritization process and "eventually. . .maybe a month or two later, [he] was going through [his] notes and said, "I might as well type these up, send her an email with the stuff." PF ¶61 (Ex. C, Habeck Dep., p. 75, ll. 7-18).

Habeck and Stevens also failed to provide timely weekly status reports, but were never disciplined. PF ¶63 (Ex. C, Habeck Dep., p. 97, ll. 12-23, p. 98, ll. 14-17; Ex. D, Kazl Dep., p. 98, ll. 18-24; PF ¶68 (Ex. H, Stevens Dep., p. 64, l. 16 – p. 67, l. 13).

v. Additional Evidence of Pretext

Those who worked most closely with Luks on the prioritization process in the year preceding his termination were unaware of any performance issues. App. 13a, 14a. Stevens and Habeck thought that Luks had been doing a good job in the implementation of the performance process and were not aware of any customer complaints. *Id.*; PF ¶71 (Ex. C, Habeck Dep., p. 91, ll. 12-14); PF ¶72 (Ex. H, Stevens Dep., p. 57, ll. 11-21). Habeck was "very surprised" when Luks was fired. PF ¶66 (Ex. C, Habeck Dep., p. 86, ll. 9-21). Goode could only recall one person who was ever critical of Luks' performance on the prioritization process. PF ¶74 (Ex. B, Goode Dep., p. 102, ll. 3-12).

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS ERRED IN REQUIRING AN ADMISSION FROM BAXTER THAT LUKS' TERMINATION WAS BASED ON AGE.

Luks produced ample evidence under both the direct and indirect methods of proof from which a reasonable fact-finder could conclude that his termination was based on age. In contravention of its own recent opinions and this Court's well-established law, the Seventh Circuit's decision requires nothing short of an admission by Baxter that its decision to terminate Luks was based on age. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-255, (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Sylvester v. SOS Children's Villages Illinois, Inc.*, 453 F.3d 900, 902-903 (7th Cir. 2006).

During the 18 years Luks worked at Baxter prior to his working under Goode he received uniformly favorable reviews. Goode evaluated Luks negatively at his first opportunity. He targeted the three oldest members of his department, Luks, Helsith and Jurmann, for termination during 2001 and 2002 *irrespective of their performance.* This fact is supported by (1) Overby's testimony that she was directed by Goode to put Helsith and Jurmann on performance plans notwithstanding their well documented good performances; (2) Overby's testimony that Kazl stated that she received a similar directive from Goode with regard to Luks, and Kazl's admitted frustration in attempting to comply with this directive; (3) the fact that it took Kazl *two months* to create Luks' performance plan; (4) blank performance related documents that precede Kazl, one of which appeared in and then disappeared from Luks' personnel file, which contain the names of Luks, Helsith and Jurmann; (5) the numerous inaccuracies and inconsistencies in Luks' 2001 year-end review as well as his performance plan objectives, which both Kazl and Goode refused to address; (6) Goode's age-related

comments; and the fact that similarly situated younger employees Habeck and Stevens were treated more favorably.[5]

In analyzing Luks' evidence, the Seventh Circuit conceded that:

> We may assume for the sake of argument that these bits of evidence[6], individually and collectively, are consistent with there being a wish and a plan by Goode to get rid of Luks along with Helsith and Jurmann irrespective of their actual performance. The factfinder arguably could infer from the testimony of Overby, as Helsith's and Jurmann's immediate supervisor, that they were being targeted for termination for reasons unrelated to their performance.... The documents, which mention Luks as well as Helsith and Jurmann and which appear to have predated the implementation of any of the performance plans, likewise could be seen as being consistent with a preconceived plan to get rid of all three employees. App. 10a.

Notwithstanding these concessions, the court concluded:

> But, as the district court reasoned, nothing in this mosaic of evidence supports the inference that Goode's apparent wish to terminate these three employees was motivated by their age. Luks does point out that the three of them were the oldest employees in Goode's chain of command. That fact is certainly consistent with age being the reason why Goode may have singled them out, but it does not

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[5] To some extent, the Seventh Circuit concedes this fact and states that it calls into question at least some of the Kazl's criticisms of Luks. App. 15a.

[6] In its analysis, the Seventh Circuit failed to consider points (3) and (5) and ignored Kazl's admission to Overby regarding Goode's directive.

> affirmatively suggest that Goode was seeking to oust them *because of* their age. *Id.*

In reaching this conclusion, the Seventh Circuit dismissed the age-related comments made by Goode, primarily on the bases that (a) they were not "in and of themselves" evidence of discriminatory intent; and (b) that they were unrelated to the termination decision because Kazl *independently* made the decisions with regard to Luks, and Goode merely" signed off on" and "supported" those decisions.[7] App. 12a. Luks does not contend, however, that the comments "in and of themselves" constitute evidence of age discrimination. Rather, these comments constitute circumstantial evidence, which, taken together with Luks' additional evidence, support the inference of age discrimination. Indeed, even *without* Goode's comments, Luks presented sufficient evidence of discrimination to preclude summary judgment.

The Seventh Circuit's analysis is fundamentally flawed in much the same respects as the Fifth Circuit's analysis was flawed in *Reeves*. As this Court stated in *Reeves*:

> [T]he Court of Appeals proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination.
>
> In so reasoning, the Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence.... [I]t it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation.

Reeves, 530 U.S. at 146-147, citing *Hicks*, 509 U.S. at 511.

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[7] The Seventh Circuit's error in this regard is discussed at length in Section II.

In fact, "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.*, citing *Hicks*, 509 U.S at 517.

The Seventh Circuit clearly acknowledges that the evidence supports the inference that Goode had a plan to get rid of the three oldest members of his department, including Luks, irrespective of their actual performance. It further acknowledges that the factfinder could infer from the testimony of Overby, as Helsith's and Jurmann's immediate supervisor, that they were being targeted for termination for reasons unrelated to their performance. Finally, it acknowledges that the evidence supports the inference that the three oldest employees were "singled out" and that Goode had a "preconceived plan to get rid of all three employees." App. 10a.

These inferences alone are sufficient under *Reeves*, *Hicks*, *Burdine* and *McDonnell Douglas*, to create genuine issues of material fact precluding summary judgment. *Reeves*, 530 U.S. at 146-147; *Hicks*, 509 U.S. at 517; *Burdine*, 450 U.S. at 252-255; *McDonnell Douglas*, 411 U.S. at 804. The trier of fact could infer from Goode's plan and directives that all or a significant part of Luks' performance plan was fabricated and that Baxter never intended Luks to survive the plan. In fact, Goode's targeting of Luks, Helsith and Jurmann irrespective of their performance and his directives to Overby to fabricate performance plans for Helsith and Jurmann, considered together with Kazl's admissions to Overby that Goode gave her a similar directive and that she was not sure what "they" wanted, is sufficient to create genuine issues of material fact as to whether Baxter's reason for terminating Luks is unworthy of credence. Luks' additional evidence with regard to Goode's age-related comments, the disparate treatment of substantially younger employees Habeck and Stevens and the inaccuracies and

inconsistencies in the plan itself[8] are but icing on the proverbial cake.

Effectively, the Seventh Circuit impermissibly requires an admission by Baxter that Luks was terminated because of his age. In dismissing the fact that Luks, Helsith and Jurmann were the three oldest employees working in Goode's department, the Seventh Circuit states: "That fact is certainly consistent with age being the reason why Goode may have singled them out, but it does not affirmatively suggest that Goode was seeking to oust them *because of* their age" App. 10a. The fact is that Luks, Helsith and Jurmann had absolutely *nothing* in common *other than* their age and the fact that they worked under Goode. Luks worked in a different department under a different supervisor than did Helsith and Jurmann. Why is Goode targeting these three employees? Why do these three names appear repeatedly on blank performance plan related documents prior to the start of Kazl's tenure at Baxter and at a time when there were no issues regarding their performance? Goode's age related comments provide an answer; however even in the absence of these comments, an inference of age discrimination is supported by the evidence. Setting aside Goode's comments, a trier of fact could reject Baxter's proffered reason for terminating Luks on the basis of Goode's preconceived plan alone. This is

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[8] The Seventh Circuit discounts these inaccuracies and inconsistencies as merely a "disagreement" between Luks and Kazl. App. 14a. This analysis is fundamentally flawed in that it is presupposes the legitimacy of the poor ratings and the performance plan. Because Luks presented evidence that Goode targeted Luks, Helsith and Jurmann before they ever received negative performance reviews, and because there is evidence that their supervisors were directed to fabricate performance plans, Luks need not disprove each individual point of the review or the plan in order to raise an inference of discrimination. *Fisher v. Transco Services-Milwaukee, Inc.*, 979 F.2d 1239, 1243 (7th Cir. 1992). (When, as in the instant case, the employer's expectations as to the employee's performance are wholly dependent upon a performance plan alleged by the employee to be a pretext for discrimination, "the issue of legitimate performance is best merged with the issue of pretext.")

sufficient to permit the trier of fact to infer the ultimate fact of intentional discrimination. *Hicks*, 509 U.S. at 511.

In essence, the Seventh Circuit is requiring Luks to present direct, explicit evidence of Baxter's discriminatory bias in contravention of this Court's decisions. It has abrogated the indirect method of proof. If the Seventh Circuit's decision is permitted to stand, victims of discrimination will have no recourse unless an employer admits that it is engaging in disparate treatment of an employee on a prohibited basis. This Court must not sanction what is effectively judicial repeal of our civil rights statutes.

II. THE COURT OF APPEALS ERRED IN WEIGHING FACTS IN FAVOR OF BAXTER AND REQUIRING PLAINTIFF TO PROVE THAT EACH AND EVERY INDIVIDUAL INVOLVED IN THE DECISION-MAKING PROCESS HAD A DISCRIMINATORY MOTIVE.

In its analysis of both the direct and indirect methods of proof, the Seventh Circuit impermissibly concluded that Luks' presented insufficient evidence of age discrimination because Luks failed to prove that *Kazl* had a discriminatory motive. Specifically, the Seventh Circuit stated:

> Indeed, the record indicates that it was Kazl, not Goode, who made the decision to fire Luks. It was Kazl who concluded at the end of 2001 that Luks' performance was unsatisfactory, who then drafted a performance plan for Luks, and who concluded ultimately that Luks should be terminated for failing to achieve the objectives of that plan. *Goode, it is true, approved Kazl's decisions at each step of this process and testified that he "coached" her in the implementation of the performance plan* to ensure that she was taking the correct steps procedurally. Goode Dep. 58. But the record does not support the inference that Goode had any role in the events

> culminating in Luks' termination other than signing off on and supporting Kazl's independent decisions.

App. 12a, 13a (emphasis added).

> The evidence of record indicates that it was Kazl, not Goode, who found Luks' performance wanting and who ultimately made the decision to fire him. Goode, as we have said, supported Kazl but (so far as the evidence reveals) *did not direct or urge her to make that decision.* To the extent one can infer that Goode had an intent to terminate Luks irrespective of his work performance, *there is no evidence that Kazl was a party to that plan* and concocted false criticisms of Luks' work in an effort to carry the plan out.

Appendix 16a (emphasis added).

As a threshold matter, in reaching these conclusions, the Seventh Circuit is clearly weighing facts in favor of the employer, in contravention of Fed. R. Civ. P. 56 and this Court's law. *Reeves*, 530 U.S. at 150; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-255 (1986). When analyzing Luks' evidence, the Seventh Circuit repeatedly uses phrases such as "in Luks' view," "circumstances that, as Luks interprets them," "Luks contends," and "To Luks' mind." App. 7a, 8a, 9a, 10a, 13a, 19a, 23a.

The evidence, if viewed in the light most favorable to Luks, indeed supports the inference that Goode *directed* Kazl to put Luks on a performance plan regardless of Luks' performance and that his ultimate goal was Luks' termination. Overby's testimony alone supports this inference. Kazl specifically told Overby that Goode had directed her to put Luks on a performance plan. Goode had earlier directed Overby to fabricate performance plans for Helsith and Jurmann. Overby understood that Goode was setting them up for termination and when she expressed her concerns to Human Resources, Goode fired her.

She believed the same thing was happening to Luks because, in addition to stating that Goode had *directed her* to put Luks on a plan, Kazl came to Overby for guidance because she was not sure what "they[9]" wanted in the plan, which ultimately took Kazl *two months* from the time of Luks year-end review to construct. The Seventh Circuit acknowledges that Goode "coached" Kazl in formulating the plan, which Goode described as "rigorous," and that he "approved" all of her decisions. App. 12a, 13a.

A reasonable inference can thus be drawn that Goode *did* direct Kazl to make the decisions with respect to both the plan and Luks' termination, and that but for his directives to their supervisors to put them on performance plans regardless of performance, Luks, Jurmann and Helsith would never have been placed on performance plans and ultimately forced out of Goode's department.

Additional evidence that the Seventh Circuit failed to view in the light most favorable to Luks includes the fact that Goode actively discouraged Luks from speaking to Human Resources following his unfavorable year end review and gave him false assurances that it was nothing to worry about. Moreover, the court wholly disregarded Luks' evidence that both Luks' year end review and the performance plan were replete with inaccuracies, including numerous references to tasks which had already been accomplished.[10] Luks provided numerous detailed examples of these inaccuracies; nothing in the record refutes them. Luks brought these inaccuracies to the attention of both Kazl and Goode, yet neither the review nor the plan was corrected.

Further calling Kazl's "honest belief" in her criticisms into question is her failure to discipline younger employees Habek

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[9] It is reasonable to infer, in light of Goode's directive that "they" refers to Goode.

[10] This evidence is set forth in detail in Luks' Statement of the Case, Section B.3

and Stevens for some of the same alleged deficiencies for which Luks was held accountable. The Seventh Circuit acknowledges some of this evidence, and states that it "might call into question the reasons Kazl gave for concluding that Luks was not performing up to snuff," but ultimately dismisses the evidence as not supporting "the inference that the overall basis for Luks' discharge was pretextual." App. 15a. Here again the court is weighing facts in the light most favorable to the Baxter. For example, there is no mention of Habeck's testimony that he and Luks had equal responsibility for creating metrics measuring the effectiveness of the prioritization process and that he and Luks did create at least ten such metrics. The court also disregards the fact that, although Luks' alleged failure to promptly develop methods of measuring the effectiveness of the prioritization process was, according to Kazl, a very important factor in the decision to terminate him, Habek, who assumed this responsibility following Luks' termination, was given no deadline and permitted to address this task months later.

The Seventh Circuit simply disregards all of this evidence, erroneously concluding that, although Kazl may have been "mistaken" in her evaluation of Luks, there was no evidence that she did not honestly believe her criticism's of him. App. 14a. If truly viewed in the light most favorable to Luks, the evidence indicates that Goode was the driving force in Luks' termination. At a minimum, it establishes that Goode played a substantial role in the decisions to place him on a performance plan and to terminate him. Contrary to the Seventh Circuit's opinion, the fact that these decisions were tainted by Goode's discriminatory motive *is* sufficient to establish pretext.

In this regard, the instant case is very similar to *Reeves*. Reeves presented evidence of age-related comments made by the Director of Manufacturing (Chesnut) to Reeves, which were not directly connected to Reeves' termination. Chestnut and other company officials recommended to the President

(Sanderson) that she fire Reeves. The Fifth Circuit held that the district court erroneously denied defendant's motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50. In reversing the Fifth Circuit's decision, this Court held that the Fifth Circuit disregarded evidence favorable to the plaintiff and failed to draw all reasonable inferences in his favor. *Reeves*, 530 U.S. at 152-153. Specifically, this Court stated:

> For instance, while acknowledging the potentially damning nature of Chesnut's age-related comments, the court discounted them on the ground that they were not made in the direct context of Reeves' termination. And the court discredited Reeves' evidence that Chesnut was the actual decisionmaker by giving weight to the fact that there was no evidence suggesting the other decisionmakers were motivated by age. *Id.*

The Seventh Circuit discounted Luks' evidence of Goode's discriminatory animus in precisely the same manner. Goode referred to Luks as "the old guy" only a few days prior to Luks' termination. His age-related references made to Overby regarding Helsith and Jurmann were made in the context of directives to put them on performance plans. Moreover, Goode exercised the same sort of power as did Chesnut in *Reeves*. Kazl and Overby were both his direct reports. Overby was fired when she expressed her concern to Human Resources concerning Goode's directives to take action against employees that she knew to be performing well. After receiving Goode's directive, Kazl sought Overby's advice in formulating Luks' performance plan. This evidence, viewed in the light most favorable to Luks, supports the inference that Goode was the driving force in Luks' performance plan and resulting termination, as well as the inference that Goode's "singling out" of Luks, Helsith and Jurmann was age-related.

When a plaintiff alleges disparate treatment, liability depends on whether the protected trait "actually played a role

in [the employer's decisionmaking] process and had a determinative influence on the outcome." *Reeves*, 530 U.S. at 141, quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). Evidence of a discriminatory animus, including derogatory comments, that emanates from a source that influenced the adverse employment action constitutes evidence of discrimination. *Hunt v. City of Markham, Illinois*, 219 F.3d 649, 653 (7th Cir. 2000). If an employer follows a recommendation tainted with an illegal basis, the employer is responsible for the harm caused. *Byrd v. Illinois Department of Public Health*, 423 F.3d 696, 708 (7th Cir. 2005). Thus, if Kazl acted as the conduit or "cat's paw" of Goode's prejudice, Kazl's purported innocence does not insulate Baxter from liability. *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990).

Baxter's contention that Kazl acted independently, if supported by the evidence presented at trial, could perhaps warrant an instruction that Kazl's independent actions break the causal link between Goode's prejudice and Luks' termination. *Byrd*, 423 F.3d at 708. This issue is not, however, appropriately resolved on a motion for summary judgment in light of the evidence of Goode's prejudice, his desire to, and indeed success in, getting rid of the three oldest employees in his department, and his influence over the decisions with respect to Luks, Jurmann and Helsith.

The Court must not sanction the Seventh Circuit's weighing of facts in favor of Baxter in direct contravention of Fed. R. Civ. P. 56. Nor should it sanction the court's requiring Luks to demonstrate that each and every individual involved in the decision-making process had a discriminatory motive. If this decision is permitted to stand, supervisors with a blatantly discriminatory motive can avoid liability simply by directing a subordinate to fabricate a basis for an employee's termination. Under the Seventh Circuit's analysis, an employee who is a victim of discrimination cannot survive summary judgment without an admission from every individual influencing the

adverse employment decision that they are engaging in disparate treatment on a prohibited basis. As such admissions are extremely rare, few if any victims of discrimination will be permitted to present their case to a jury.

CONCLUSION

For each of the foregoing reasons, the petition for a writ of *certiorari* should be granted, the decision of the Seventh Circuit reversed, and the case remanded to the district court for trial.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED NOVEMBER 3, 2006

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 05-3866

PETER LUKS,

Plaintiff-Appellant,

v.

BAXTER HEALTHCARE CORPORATION,

Defendant-Appellee.

Argued April 3, 2006—Decided November 3, 2006

Before EASTERBROOK, ROVNER, and WILLIAMS, *Circuit Judges.*

ROVNER, *Circuit Judge.* Peter Luks contends that Baxter Healthcare Corporation ("Baxter") discharged him on the basis of age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. ("ADEA"). The district court granted summary judgment to Baxter. Luks appeals, and we affirm.

Appendix A

I.

Luks began his employment with Baxter in 1982. Twenty years later, at the time of his discharge, he had attained the position of Senior Business Systems Consultant. He was fifty-two years old when he was terminated.

In August 2000, Baxter hired John Goode as its Vice President of Architecture, Technology and Planning, and Luks began reporting to Goode. Goode prepared Luks' year-end evaluation for 2000. In the original draft of that evaluation, Goode indicated that Luks did not meet expectations in two areas. After discussing the draft with Luks, Goode revised the evaluation to indicate that Luks was meeting expectations in those areas. However, the final report was still critical of Luks in certain respects, observing for example that Luks did not provide sufficient leadership, direction and managerial support to the team of technical employees under him.

In March of the following year, Baxter hired Carol Kazl as the Director of the company's Program Office. That office was responsible for coordinating all information technology projects undertaken throughout the firm. Goode assigned Luks to work in the Program Office as a Technical Consultant under Kazl's supervision. Luks' first assignment was to develop a process by which the Program Office would evaluate and prioritize requests for information technology work and then assign those requests to a team in the Corporate Information Technology Department. Luks was well into the development of this prioritization process in late August of 2001, when Kazl gave him his mid-year evaluation. Kazl

rated Luks as meeting expectations overall. She did suggest, however, that Luks needed to make more of an effort to submit his status and time reports in a timely manner, to be open to new ideas and suggestions, to follow through on the implementation of his ideas, and to more effectively discuss the prioritization process on a broader (i.e., less technically detailed) level. Kazl advised Luks that his title would change to that of Senior Business Systems Consultant at the end of the year as he began to implement and manage the prioritization process he had been developing.

During the latter part of 2001, as Luks increasingly focused on implementation and management of the prioritization process he had developed, Kazl became dissatisfied with his performance. Kazl was concerned that the turnaround time on project requests was too great, that the database of pending information technology requests that Luks had created was not kept updated, and that Luks failed to follow through on offers of assistance. When she completed her year-end evaluation of Luks' performance, Kazl concluded that Luks was not managing the prioritization effectively and thus was not meeting expectations. Kazl identified ten specific areas in which Luks needed to improve. Kazl shared her evaluation with Goode, who agreed with her assessment.

Kazl met with Luks in January 2002 to discuss the evaluation. Luks voiced his disagreement with a number of comments in the review as well as its overall negative tone. Kazl made certain revisions to the report based on her discussion with Luks, deleting some criticisms but leaving others in place. She also drafted a set of performance

objectives for the new year that she had Luks review and acknowledge. Luks subsequently complained to Goode that he believed his year-end review was inaccurate and unfair. Goode informed Luks that he would defer to Kazl's assessment. Goode gave Luks the impression that he did not need to worry about the review.

Because she had given Luks an overall rating of "does not meet expectations," Kazl placed him on a thirty-day performance improvement plan. The plan set forth certain observations about Luks' prior performance and set forth twenty-eight targets for improvement. Before she imposed the plan, Kazl consulted with Goode as well as Gretchen Nester, Baxter's Human Resources Manager, both of whom thought that the plan was appropriate. Kazl presented the plan to Luks in late March 2002 and went through it with him. After reviewing the plan at home, Luks discussed it with Kazl a second time. Luks again expressed his disagreement with Kazl's assessment that his performance was not meeting expectations. At the conclusion of the discussion, Kazl admonished Luks that he was expected to meet the objectives of the plan within the next thirty days. Luks believed that he would be able to do so; he also understood that he was subject to termination if he did not. Luks and Kazl were to meet regularly to evaluate his progress, but it was otherwise Luks' responsibility to provide Kazl with updates.

Luks subsequently met with Goode to discuss the performance plan. Luks read Goode a prepared statement expressing his reservations regarding Kazl. Luks asked that he report directly to Goode instead of Kazl and/or that the

performance plan be removed from his file. Goode denied these requests. He suggested that Luks try to comply with the plan and indicated that his performance would be reviewed in thirty days.

Although Kazl was initially encouraged with Luks' efforts to comply with the plan, at the end of the thirty-day period she concluded that Luks had not sufficiently improved his performance. Kazl believed that Luks' performance was still unacceptable in a number of respects. In fact, as she updated the performance plan to reflect what Luks had achieved, she concluded that Luks had met only nine of the twenty-eight objectives in the plan. After meeting with Nester, Kazl decided to terminate Luks. Goode subsequently reviewed the updated performance plan and concurred in Kazl's decision.

On May 2, 2002, Kazl and Nester met with Luks and advised him that Baxter was terminating his employment for failure to satisfy the requirements set forth in the performance plan. Kazl went through the plan with Luks and discussed with him her assessment of his progress as to each of the objectives included in the plan. Luks registered his disagreement with a number of Kazl's observations.

Following Luks' departure from the company, Baxter initially posted his position as open, and two of his former co-workers, Terri Stevens and Nathan Habeck, were directed to assume his duties until the vacancy was filled. Baxter subsequently concluded that budgetary constraints precluded the company from hiring anyone to fill the position. At that point, Stevens took over the bulk of Luks' former

responsibilities. The following year, organizational changes prompted Baxter to abandon the prioritization process that Luks had spearheaded.

II.

Luks contends, contrary to the district court's conclusion, that he has presented sufficient evidence that he was discharged because of his age so as to require a trial. Our review of the district court's summary judgment is de novo. *E.g., Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir.2003). We are, of course, obliged to construe the admissible evidence in Luks' favor in deciding whether the record presents a question of material fact that precludes summary judgment in Baxter's favor. *Id.*

A plaintiff can establish that he is the victim of age discrimination through direct or indirect means. The distinction between the two avenues of proof is "vague," *Sylvester v. SOS Children's Villages Illinois, Inc.*, 453 F.3d 900, 903 (7th Cir.2006), and the terms "direct" and "indirect" themselves are somewhat misleading in the present context. For, as we recently explained in *Sylvester*, "direct" proof of discrimination is not limited to near-admissions by the employer that its decisions were based on a proscribed criterion (*e.g.*, "You're too old to work here."), but also includes circumstantial evidence which suggests discrimination albeit through a longer chain of inferences. *Id.* at 902-03; *see also Ptasznik v. St. Joseph Hosp.*, 464 F.3d 691, 695 (7th Cir.2006). The "indirect" method of proof involves a subset of circumstantial evidence (including the disparate treatment of similarly situated employees) that

conforms to the prescription of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). *See Sylvester*, 453 F.3d at 902. Luks believes that he can establish age discrimination through both means.

Luks has identified two sets of facts in an effort to establish directly that he is the victim of age discrimination. The first includes a series of remarks by Goode which, in Luks' view, evince a desire to rid Goode's department of its oldest employees, including Luks. The second is a series of circumstances that, as Luks interprets them, suggest a plan by Goode to make his wish a reality. We begin with the second set of circumstances.

Luks cites a series of events, remarks, and documents which Luks believes amount to what the cases describe as a "mosaic" of facts bespeaking age discrimination. *See id.* at 903 (collecting cases). As *Sylvester* clarified, evidence of this sort need not necessarily take the form of a convincingly rich mosaic; it is enough that the circumstances give rise to a reasonable and straightforward inference that the employer has relied on a proscribed factor in taking action against the employee. *Id.* at 904; *see also Ptasznik*, 464 F.3d at 695. Luks relies on the following evidence to create this mosaic.

First, Cynthia Overby, Manager of Web Services, had a meeting with Goode in late 2001 or early 2002 in which Goode expressed dissatisfaction with the performance of Glen Jurmann and Larry Helsith, both of whom reported to her. Overby herself was satisfied with the work of both men and told Goode so. Nonetheless, Goode subsequently directed Overby to put Helsith and then Jurmann on performance

plans. Overby disagreed with the need for such plans. When she told Goode that she did not believe that a plan for Jurmann was necessary (she believed his performance was excellent), Goode told her that if she was unwilling to implement such a plan, she should find a position for Jurmann elsewhere in the company; Overby later succeeded in having Jurmann transferred to a different department. Overby did implement a plan for Helsith (whose work she regarded as above average) in consultation with both Goode and Nester but became convinced that they were intent on fabricating a reason for Helsith's discharge. In an effort to prevent that from happening, Overby provided Nester with performance appraisals documenting Helsith's satisfactory performance. When Goode found out what Overby had done, he fired her. Helsith was subsequently terminated as part of a reduction in force.

Second, there are three documents which, in Luks' view, bespeak a plan to get rid of Helsith, Jurmann, and himself. Overby testified that when she met with Goode in late 2001 or early 2002 and he expressed his dissatisfaction with Helsith and Jurmann, she happened to observe that Goode had a sheet of paper in his notebook which had not only their names but Luks' name written on it. (Overby could not recall what else was written on the paper.) Next, not long after Kazl became Luks' supervisor, she discovered some sort of blank performance plan in Luks' personnel file that appeared to envision certain action vis-à-vis Luks' employment; the plan had the names of Helsith, Jurmann, and Luks written on it. Kazl mentioned the document to Nester and showed it to Luks; neither of them knew anything about it. When Luks himself reviewed his personnel file days later, the document

was no longer there. Finally, a blank "Performance Objective Template" produced by Baxter in discovery likewise bore the names of Luks, Helsith, and Jurmann. A handwritten note at the bottom of the template, dated February 8, 2001, reflects a meeting between Goode and someone else concerning efforts to document Luks' performance. It was around this same time that Goode began keeping a log of "various issues" involving Luks. Goode Dep. 214.

Third, Luks contends that the criticisms included in his 2001 year-end review, the observation items that were later incorporated into his performance plan, and the reasons given for his termination either were factually inaccurate, failed to comprehend Luks' role in the Program Management Office, or were unsupported with examples. Luks adds that Kazl was unreceptive to a dialogue about the accuracy of these criticisms, as was Goode. To Luks' mind, Kazl, consistent with Goode's wish to get rid of him, was simply fabricating a list of reasons to justify his discharge. Luks points out that Overby had the same impression. Overby testified that she had discussed Luks' performance improvement plan with Kazl, who came to her for guidance knowing that Overby had been asked to put together similar plans for Helsith and Jurmann. According to Overby, Kazl was not quite sure how to proceed with the plan, was "extremely frustrated" by the task, and was not quite sure what "they" wanted. Overby Dep. 41, 44-45. Overby herself had worked with Luks and had a favorable impression of his skills. Overby surmised that Luks, like Helsith and Jurmann, was being set up for discharge.

Appendix A

We may assume for the sake of argument that these bits of evidence, individually and collectively, are consistent with there being a wish and a plan by Goode to get rid of Luks along with Helsith and Jurmann irrespective of their actual performance. The factfinder arguably could infer from the testimony of Overby, as Helsith's and Jurmann's immediate supervisor, that they were being targeted for termination for reasons unrelated to their performance. The inference is somewhat less plausible as to Luks, in that it depends largely on his own subjective assessment (with a second from Overby and certain of his co-workers) that his performance was adequate. We shall have more to say about that below with respect to pretext, but we will put that aside for now. The documents, which mention Luks as well as Helsith and Jurmann and which appear to have predated the implementation of any of the performance plans, likewise could be seen as being consistent with a preconceived plan to get rid of all three employees.

But, as the district court reasoned, nothing in this mosaic of evidence supports the inference that Goode's apparent wish to terminate these three employees was motivated by their age. Luks does point out that the three of them were the oldest employees in Goode's chain of command. That fact is certainly consistent with age being the reason why Goode may have singled them out, but it does not affirmatively suggest that Goode was seeking to oust them *because of* their age.

Luks has, however, identified a separate collection of facts that he believes support this very inference. These include a series of remarks related to age that, in Luks' view, indicate that Goode was averse to older employees like Luks.

Appendix A

First, in the course of discussions between Goode and Overby regarding the implementation of performance plans for Helsith and Jurmann, Goode remarked at one point that he wanted to get rid of the "good old boys" and bring an end to the "good old boys club." *See* Overby Dep. 20-21. (According to Baxter, Goode made those remarks not during a discussion of Helsith and Jurmann, but rather in reference to individuals on a technical leadership team who had been with the company for long periods of time. But we accept Luks' construction as accurate for present purposes.) Goode also indicated to Overby that he was looking for "higher energy" employees. Overby Dep. 23.

Second, Human Resources Manager Nester reported complaints from both Jurmann and Helsith that Goode was "disrespectful" and "lacked professionalism" in his interactions with people and more specifically that he had made remarks to them about "old timers." Nester Dep. 46-47, 52. Helsith had indicated to Nester that Goode used that term in reference to long-time Baxter employees.

Third, in April or May 2002, around the time of Luks' termination, Goode introduced Luks to a new secretary at Baxter as "the old guy in the department." Luks Dep. 235-36.

Ultimately, none of these remarks supports the inference that Luks was discharged because of his age. With respect to the "good old boy" references, we have previously held that a nearly identical remark, uttered by another Baxter employee, was not evidence of age discrimination. *Lindsey v. Baxter Healthcare Corp.*, 962 F.2d 586, 588 (7th Cir.1992)

("No weight can be attached to an overheard comment that Baxter does not like to promote 'good old boys,' since any competent user of the English (or rather the American) language knows that to be a good old boy one need not be old, or for that matter good."). Goode's expressed interest in "higher energy" employees, although potentially consistent with age discrimination, is not by itself direct evidence of such discrimination. *E.g.*, *Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106, 1113 (7th Cir.1998); *Svenson v. William Wrigley, Jr. Co.*, No. 95 C 4198, 1996 WL 705250, at *4-*5 (N.D.Ill. Nov.27, 1996) (Williams, J.). Nester's testimony as to what Helsith and Jurmann told her about Goode's remarks amounts to inadmissible hearsay, as the district court reasoned. Luks has made no effort to surmount that problem. Finally, Goode's reference to Luks as the "old guy in the department," even if construed as a reference to his age rather than his tenure, does not suggest that age was a factor in the decision to fire Luks. Beyond the fact that the remark (which Luks admits was "kind of a joke," Luks Dep. 237) was made close in time to Luks' discharge, nothing links Goode's remark to Baxter's decision to let Luks go. Indeed, the record indicates that it was Kazl, not Goode, who made the decision to fire Luks. It was Kazl who concluded at the end of 2001 that Luks' performance was unsatisfactory, who then drafted a performance plan for Luks, and who concluded ultimately that Luks should be terminated for failing to achieve the objectives of that plan. Goode, it is true, approved Kazl's decisions at each step of this process and testified that he "coached" her in the implementation of the performance plan to ensure that she was taking the correct steps procedurally. Goode Dep. 58. But the record does not support the inference that Goode had any role in the events

culminating in Luks' termination other than signing off on and supporting Kazl's independent decisions. In short, there is no evidence that Goode's dislike of older workers, if that is what his remarks reveal, played any role in Luks' termination.

Luks is left with trying to establish discrimination under the *McDonnell Douglas* framework. Under that framework, Luks must first establish a prima facie case of discrimination by showing, among other things, that he was meeting Baxter's legitimate performance expectations. Assuming that Luks makes out a prima facie case, Baxter must then articulate a legitimate, nondiscriminatory reason for his discharge. Luks is then obliged to establish that the reason articulated for his discharge is pretextual. The district court proceeded directly to the subject of pretext, assuming that Luks had made a prima facie showing of discrimination and that Baxter had articulated nondiscriminatory reasons for Luks' termination. We shall do the same.

As noted above, Luks contends that the criticisms cited in his adverse year-end review for 2001 and the ensuing performance plan were inaccurate and/or unfounded. He adds that we should not credit Kazl's testimony that he ultimately failed to meet the goals of the performance plan, because Kazl acknowledged that Luks showed significant improvement during the first two weeks of the thirty-day period but was largely out of the office for the rest of that period. Moreover, two of the co-workers who worked most closely with Luks during the year preceding his termination, Stevens and Habeck, testified that they were unaware of any issues with Luks' performance and believed that he was doing

a good job. Habeck, it turns out, shared responsibility with Luks for certain aspects of the prioritization process (for example, keeping the database of pending project requests updated), yet unlike Luks Habeck was never criticized by Kazl for the shortcomings she perceived in those areas. And like Luks, Habeck and also Stevens were expected to give Kazl weekly updates on their job responsibilities. Both Stevens and Habeck said that they occasionally failed to provide Kazl with those reports, yet neither was ever rated negatively by Kazl for those failures.

The problem is that none of this suffices to establish pretext. Luks' own opinion that he was doing the job satisfactorily is beside the point. *See, e.g., Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 985 (7th Cir.1999). His assertions as to purely factual matters within his personal knowledge might establish questions of fact on those points, *Payne v. Pauley, supra*, 337 F.3d at 771-73, but the relevant question is not whether the criticisms of his performance were right or wrong but whether his supervisor honestly believed them. *E.g., Gusewelle v. City of Wood River*, 374 F.3d 569, 576 (7th Cir.2004). At most, Luks' disagreement with the criticisms levied against him, coupled with the purported unwillingness of either Kazl or Goode to discuss his disagreement, shows that Kazl may have been mistaken in her assessment and that both she and Goode were bull-headed in their refusal to consider that possibility; but it does not show that Kazl was untruthful in her negative evaluation of Luks. The fact that Kazl thought he was doing well on the performance plan initially does not undercut her ultimate conclusion that he did not meet all of the plan's objectives. Kazl herself agreed at end of the thirty-day period that Luks

had met some of the objectives but believed that he had failed to achieve others. The fact that she was not in the office for a portion of the thirty-day period does not call into question the honesty of that conclusion. Finally, the fact that Luks' coworkers thought he was doing a good job is beside the point. They were not charged with the responsibility of monitoring and evaluating Luks' work performance; Kazl was.

Potentially more relevant is the evidence that two of the people who worked with Luks-Habeck and Stevens-were not evaluated negatively despite the fact that Habeck's duties overlapped with those of Luks on aspects of the prioritization process that Kazl found wanting and that Habeck and Stevens both engaged in conduct (namely, failing to submit weekly reports) for which Kazl criticized Luks. Given that Habeck and Stevens worked in the same department as Luks and reported to Kazl, the disparate treatment might call into question the reasons Kazl gave for concluding that Luks was not performing up to snuff. Still, there are two problems with this evidence. First, Luks was the individual responsible for the development and implementation of the prioritization process, and Kazl arguably would be entitled to hold Luks to a higher standard of conduct based on his leadership position. That point aside, the testimony of Habeck and Stevens calls into question some but not all of the grounds on which Kazl concluded that Luks was not meeting expectations. As such, the evidence does not support the inference that the overall basis for Luks' discharge was pretextual. *See Wolf v. Buss (America) Inc.*, 77 F.3d 914, 920 (7th Cir.1996).

Appendix A

Even if we take into account the other circumstantial evidence that Luks has cited as direct evidence of discrimination, including in particular the evidence suggesting that Goode had a wish to get rid of Luks, the case for pretext still comes up short. The evidence of record indicates that it was Kazl, not Goode, who found Luks' performance wanting and who ultimately made the decision to fire him. Goode, as we have said, supported Kazl but (so far as the evidence reveals) did not direct or urge her to make that decision. To the extent one can infer that Goode had an intent to terminate Luks irrespective of his work performance, there is no evidence that Kazl was a party to that plan and concocted false criticisms of Luks' work in an effort to carry the plan out.

III.

We Affirm the entry of summary judgment against Luks and in favor of Baxter.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED AUGUST 29, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 04 C 2958

PETER LUKS,

Plaintiff,

vs.

BAXTER HEALTHCARE CORPORATION,

Defendant.

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Peter Luks has sued his former employer, Baxter Healthcare Corporation, for age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621. Baxter has moved for summary judgment. For the reasons stated below, the Court grants Baxter's motion.

Appendix B

Facts

Luks was born on October 30, 1949 and is therefore a member of the class protected under the ADEA. He claims he was subject to age discrimination in the form of adverse changes to his job, disciplinary actions, adverse performance evaluations, and termination.

Luks worked for Baxter from September 1982 through May 2, 2002. In August 2000, Luks was a technical consultant assigned to work for John Goode, Baxter's Vice President of Architecture, Technology, and Planning. In March 2001, Goode told Luks he was being transferred to the newly created program office. At the Program Office, Luks reported to the Director, Carol Kazl, who in turn reported to Goode. The Program Office was responsible for the management of information technology projects across Baxter entities. Luks was a Senior Business Consultant in the Program Office, and as such, he was responsible for developing and operating a prioritization process in which all of Baxter's information technology projects were evaluated and inventoried.

Baxter employees receive mid-year and year-end reviews. Before 2001, Luks had never received a "does not meet expectations" overall rating on any review. In his first review completed by Goode, however, Luks received a "does not meet expectations" rating on two objectives within his review, though Goode agreed to change the ratings to "meets expectations" after discussing them with Luks. In his first review after being transferred to the Program Office, the mid-year review for 2001, Kazl rated Luks as "meets expectations." In his year-end review, however, Luks received

an overall "does not meet expectations" rating. Luks did not agree with many of the criticisms in his performance review and voiced concerns to co-workers that he was being set-up to be terminated. Luks also met with Goode to explain his dissatisfaction with Kazl's review and his desire to complain about the review to human resources. Luks claims that Goode advised him not to talk to human resources and not worry about the review because it was not important.

Soon after receiving the poor rating, however, Luks was put on a performance plan. The plan established twenty-eight performance goals, which Luks was given thirty days to meet. On May 2, 2002, approximately six weeks after the commencement of the performance plan, Kazl terminated Luks, claiming that he had failed to meet certain elements of the plan.

At the time of his termination, Luks was fifty-two years old, Kazl was forty-seven years old, and Goode was forty-four years old. Luks contends that the true reason for his termination was not his performance, but rather Goode's desire to rid the Architecture, Technology, and Planning division of its three oldest employees – Peter Luks, Glen Jurmann, and Larry Helsith, who were all over the age of fifty. Pl. Ex. V ¶ 6. Luks claims that Goode succeeded in forcing him out by ensuring that he received unwarranted bad reviews and ordering him to be placed on a performance plan despite his satisfactory performance.

Appendix B

Discussion

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The Court must view the facts in favor of the non-moving party and draw reasonable inferences in favor of that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The ADEA provides that it is unlawful for an employer to discharge any individual because of his age. 29 U.S.C. § 623(a)(1). Luks has brought his age discrimination claim under a disparate treatment theory. Under this theory, he must prove that his age played a role in Baxter's decision making process and had a "determinative influence on the outcome." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141 (2000). Stated another way, Luks must show that "but for" age discrimination, he would not have been fired. *Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 396 (7th Cir. 1997).

1. Direct method of proof

Luks can defeat Baxter's summary judgment motion by submitting evidence from which a jury could find he was terminated because of age discrimination, either by the direct method of proof or by the indirect *McDonnell Douglas* burden-shifting method. *Stone v. City of Indianapolis Pub. Util. Div.*, 281 F.3d 640, 644 (7th Cir. 2002). "The direct method of proof permits a plaintiff to show, by way of direct

or circumstantial evidence," that his termination was motivated by an impermissible purpose. *Rhodes v. Ill. Dept. of Transportation,* 359 F.3d 498 (2004). Luks asserts that he has presented direct evidence in the form of testimony regarding allegedly discriminatory remarks made by Goode regarding older employees, including Luks. Luks presents deposition testimony of Gretchen Nester, head of human resources at Baxter, who stated that two older employees, Jurmann and Helsith, complained to her that Goode referred to them as "old timers." Nester Dep. at 47, 51-52. Luks himself testified that Goode introduced him to incoming employees as the "old guy" in the department. Luks Dep. at 235-236. Finally, Luks presents deposition testimony from Cynthia Overby, Baxter's former web services manager, that Goode told her he wanted to get rid of the "good old boys" at Baxter. Overby Dep. at 20.

These remarks are not direct evidence of age discrimination. First, Luks has failed to provide evidence from which a jury could find that the "good old boys" comment was based on age or related to any employment decision. *Lindsey v. Baxter Healthcare Corp.,* 962 F.2d 586, 588 (7th Cir. 1992) ("No weight can be attached to an overheard comment that Baxter does not like to promote 'good old boys,' since any competent user of the English (or rather the American) language knows that to be a good old boy one need not be old, or for that matter good."); *McCarthy v. Kemper Life Ins. Co.,* 924 F.2d 683, 686-87 (7th Cir. 1991) (to survive summary judgment, discriminatory comment must be related to the employment decision at issue). Second, Goode's reference to Luks as the "old guy" in the department is not direct evidence of age discrimination because Luks

has offered no evidence that the comment was connected to any employment decision. *Fuka v. Thomson Consumer Elecs.*, 82 F.3d 1397, 1403 (7th Cir. 1996) (stray remarks regarding older people by co-workers did not qualify as direct evidence because they were not related to the employment decision in question); *see also, Robin v. Espo Engineering Corp.*, 200 F.3d 1081, 1089 (7th Cir. 2000) (references to the plaintiff as an "old S.O.B." and "getting too old" were made in the context of "random office banter," and were therefore, without more, insufficient to create a triable issue of fact of age discrimination); *Hoffman*, 144 F.3d at 1122 (statements to the plaintiff that he was "getting old" and that "fresh legs" were needed by the company was not enough to survive summary judgment). Finally, Nester's testimony regarding what Jurmann and Helsith reported Goode said to them is inadmissible hearsay.

To proceed under the direct method of proof without direct evidence, Luks must present circumstantial evidence of age discrimination. Specifically, to avoid summary judgment using circumstantial evidence, Luks must construct a "convincing mosaic" of circumstantial evidence that "allows a jury to infer intentional discrimination by the decision-maker." *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994). In *Troupe*, the Seventh Circuit identified three categories of circumstantial evidence: (1) suspicious timing; ambiguous statements; behavior or comments directed at other employees; and other "bits and pieces" of evidence from which an inference of discrimination can be drawn; (2) evidence suggesting that similarly situated, younger employees received better treatment; and (3) evidence that the stated reason for

termination was a "mere pretext for discrimination." *Id.; see also Volovsek v. Wisconsin Dept. of Agr., Trade, and Consumer Protection,* 344 F.3d 680, 689-90 (7th Cir. 2003).

Luks offers as circumstantial evidence his testimony that most of the criticisms listed on his year-end 2001 review that led to the poor rating were incorrect and without factual foundation. Luks Dep. at 122. Luks says he provided Kazl with specific examples of why the criticism was unwarranted. *Id.* at 61-63, 76-77, 81-82, 69-70. Luks also disagreed with Kazl's claim that he had not met the performance plan's goals. He testified that the claims of failure lacked a factual foundation and that Kazl could not provide examples to support the claims. *See, e.g.,* Luks Dep. at 138-39, 150, 157, 178; *see* Pl. Ex. L (Luks' notes in preparation for a meeting with Kazl) & U (statement Luks read to Goode). But Luks' opinion of his performance is not circumstantial evidence of discrimination; it does not suggest that Baxter's stated reason for terminating him — poor performance — was not honestly believed. *See, e.g., Gusewelle v. City of Wood River,* 374 F.3d 569, 576 (7th Cir. 2004) (issue of pretext; employee must show that employer did not honestly believe stated reason for its action); *cf. Jackson v. E.J. Brach Corp.,* 176 F.3d 971, 985 (7th Cir. 1999) (employee's opinion of his own ability is insufficient to contradict employer's negative assessment). Luks "must show more than that the employer's decision was incorrect; the plaintiff must also show the employer lied about its proffered explanation." *Johnson v. Nordstrom,* 260 F.3d 727, 732 (7th Cir. 2001) (issue of pretext).

Luks contends Goode's plan was to terminate him along with Helsith and Jurmann, the oldest members of Goode's

division, and in support of this he offers the deposition testimony of Cynthia Overby, Baxter's web services manager until December 2002. Overby, who reported to Goode, worked with Luks and was the direct supervisor of Helsith and Jurmann. She testified that she and Goode had strong disagreements over the work performance of Helsith and Jurmann and that Goode directed her to put Helsith and Jurmann on performance plans despite her insistence that both were competent employees. *See* Overby Dep. at 15-16, 34. Overby believed that Goode was trying to set the two employees up for failure, and ultimately for termination. *Id.* at 18, 26. Overby testified that she did not want to have a part in what she believed to be Goode's plan to terminate Helsith and Jurmann, so she worked out a transfer within Baxter for Jurmann, *id.* at 31, and provided documentation of Helsith's good performance to Gretchen Nester, Baxter's director of human resources. *Id* at 17-18.[1] Goode fired Overby several months later, which Overby claims was retaliation for trying to protect Helsith and Jurmann. *Id.* at 19.

Overby's testimony does not help Luks, however, because nothing in her testimony points to the conclusion that the alleged set-up of Helsith and Jurmann was motivated by age discrimination. Circumstantial evidence presented under the direct method of proof "must point *directly* to a discriminatory reason for the employer's action." *Jordan v. City of Gary, Ind.*, 396 F.3d 825, 832 (7th Cir. 2005) (emphasis added); *Cowan v. Glenbrook Security Services, Inc.*, 123 F.3d 438, 443 (7th Cir. 1997) (direct evidence "must

1. Jurmann was able to transfer, Overby Dep. at 31, but Helsith was terminated several months after being placed on the performance plan, as part of a reduction-in-force. Goode Dep. at 69.

not only speak directly to the issue of discriminatory intent, it must also relate to the specific employment decision in question.").

Overby also testified that her experience working with Luks for about six months after working with positive and that she found he was knowledgeable, had good communication skills, and followed through on projects. Overby Dep. at 39-40. Overby says that in a November 2001 meeting, Kazl said Goode instructed her to put together a performance plan for Luks, and she asked Overby for input because she had designed the plans for Helsith and Jurmann. *Id.* at 41. After several meetings, Overby concluded that Goode's motivation was the same as she felt it had been for Jurmann and Helsith, i.e., to set Luks up for termination. *Id.* at 40-41. But Overby's opinion regarding the motivations of Goode and Kazl is irrelevant, and her testimony about what Kazl told her, like her testimony about the Helsith and Jurmann performance plans, does not suggest that the decision to put Luks on a performance plan was based on his age.

Luks' points to a document produced by Baxter that has his name and those of Jurmann and Helsith written across the top. PI. Ex. W. The document appears to concern performance plans, and it contains handwritten notations dated February 2001 that appear to concern a meeting the author had with Goode about his efforts to document performance issues with Luks.[2] This may be the same document that Kazl testified she found in Luks' personnel

2. February 2001 is also when Goode began keeping a log of his interactions with Luks.

file, Kazl Dep. at 154, and that Overby said Goode had at a meeting in late 2001 or early 2002 at which he discussed the performance problems of Helsith and Jurmann. Overby Dep. at 11, 13. Luks argues that the existence of this document or documents, which listed the three oldest employees in the division, is circumstantial evidence of age discrimination. The Court disagrees; there is nothing in the document(s) or the evidence about it that even hints at discriminatory intent.

In sum, Luks has offered no direct evidence of age discrimination and has not offered what a jury reasonably could find to be a "convincing mosaic" of circumstantial evidence.

2. Indirect method of proof

Under the indirect, burden-shifting method set out in *McDonnell Douglas,* Luks must first establish a prima facie case of age discrimination. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973); *O'Connor v. Consol. Coin Caterers Corp.,* 517 U.S. 308, 311 (1996) (applying *McDonnell Douglas* to claims brought under the ADEA). To make out a prima facie case, Luks must provide evidence from which a jury could find that he is at least forty years old, was performing up to Baxter's legitimate expectations, suffered an adverse employment action, and similarly situated employees under the age of forty were treated more favorably. *See, e.g., Fairchild v. Forma Scientific, Inc.,* 147 F.3d 567, 571-71 (7th Cir. 1998). If Luks cannot establish a prima facie case, his claim fails. If, however, he succeeds in making out a prima facie case, the burden then shifts to Baxter to articulate a legitimate, nondiscriminatory reason for

terminating him. *McDonnell Douglas,* 411 U.S. at 802. If such a reason is offered, Luks must then show that Baxter's proffered reason is merely pretext for discrimination. *Schuster v. Lucent Technologies, Inc., 327* F.3d 569, 574 (7th Cir. 2003).

The parties dispute whether Luks was meeting employment expectations and thus whether he can establish a prima facie case. But assuming Luks could do so, Baxter has met its burden to proffer a non-discriminatory reason for Luks' termination: poor performance. Pl. Ex. J (2001 year-end review with "does not meet expectations" rating) & K (performance plan with Kazl's notations regarding job objectives Luks failed to meet). This would shift the burden back to Luks to provide evidence from which a jury reasonably could find that Baxter's reason was pretextual. Because, as we discuss below, Luks cannot meet that burden, the Court need not address whether he can clear the prima facie case threshold. *See, e.g., Fairchild,* 147 F.3d at 572.

Luks offers substantially the same evidence to show pretext as he did to show intentional discrimination under the direct method of proof. As the Court has already discussed, this evidence is insufficient to create a triable issue of fact. The evidence of age-related remarks unrelated to any employment decision, Luks' testimony regarding his own performance, Overby's testimony regarding Helsith and Jurmann, and the document with the names of Luks, Helsith, and Jurmann, considered together, do not call into question the honesty of Baxter's stated reason for terminating Luks. *See, e.g., Flores v. Preferred Technical Group,* 182 F.3d 512, 516 (7th Cir. 1999) (the question is "not whether the

employer's reasons for a decision are 'right' but whether the employer's description of its reasons is honest").

The only other evidence Luks has to offer on the issue of pretext concerns the employees who took over his responsibilities after he was terminated: Nathan Habeck and Terri Stevens, both of whom were a good deal younger than Luks, and who had shared certain responsibilities with Luks before he was terminated. Luks claims that Habeck and Stevens received more favorable treatment from Goode and Kazl because they were significantly younger. *Gordon v. United Airlines, Inc.*, 246 F.3d 878, 892 (7th Cir. 2001) ("A showing that similarly situated [younger employees] received more favorable treatment can also serve as evidence that the employer's proffered legitimate, nondiscriminatory reason for the adverse job action was a pretext for discrimination."). Luks has offered evidence that Habeck and Stevens did some of the same things that were the basis for Luks' poor reviews, but that they got favorable reviews and were not subjected to any adverse action. Habeck testified that he shared with Luks some of the responsibilities of running the prioritization program and that he sometimes turned in late reports but never received negative comments from Kazl. Habeck Dep. at 62, 98-99. Stevens also sometimes turned in late reports but, unlike Luks, never received a "does not meet expectations" review. Stevens Dep. at 66-67.

But because Luks has failed to offer evidence from which a jury reasonably could find that Habeck and Stevens were similarly situated to him, the evidence about their allegedly more favorable treatment would not support a finding of pretext. *See Radue v. Kimberly-Clark Corp.*, 219 F.3d 612,

617 (7th Cir. 2000). This evidence is insufficient to permit a reasonable jury to find pretext, however, because Luks fails to show that he was actually similarly situated to Habeck and Stevens. First, Luks provides no evidence as to Habeck and Stevens' experience, qualifications, or education. *Ajayi v. Aramark Bus. Svcs., Inc.*, 336 F.3d 520, 532 (7th Cir. 2003) (to determine whether employees are comparable, courts should look at whether employees have comparable experience, education, qualifications, and job descriptions). Second, Luks was Habeck and Stevens' superior, *see* Luks Dep. at 28-30, and thus reasonably could be held to higher standards by management. Finally, it is anything but apparent that Habeck or Stevens missed deadlines with the same frequency as Luks. *See* Luks Dep. at 62-63; Stevens Dep. at 66; Habeck Dep. at 98.

In sum, Luks has failed to provide evidence from which a reasonable jury could find that Baxter's reason for terminating him was pretextual.

Conclusion

For the foregoing reasons, the Court grants defendant's motion for summary judgment [docket no. 11-1]. The Clerk is directed to enter judgment in favor of the defendant. The trial date of January 9, 2006 is vacated.

s/ Matthew F Kennelly
MATTHEW F. KENNELLY
United States District Court

Date: August 29, 2005

(2)

No. 06-1087

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

PETER LUKS,

Petitioner,

v.

BAXTER HEALTHCARE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent provides the following corporate disclosure.

Respondent Baxter Healthcare Corporation ("Baxter") is a publicly traded corporation. Its parent company is Baxter International Inc. No publicly traded company owns 10 percent or more of Baxter's stock.

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OPPOSITION TO PETITION FOR CERTIORARI

This is an unexceptional case involving the straightforward application of federal discrimination law. As explained below, the Seventh Circuit's judgment was grounded in well-established law, raises no conflict with decisions of other circuits or this Court, and presents no issue that warrants review by the Court. Accordingly, Respondent Baxter Healthcare Corporation ("Baxter") respectfully requests that this Court deny the petition for a writ of certiorari filed by Petitioner, Peter Luks ("Luks"), seeking review of the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on December 3, 2006.

STATEMENT

This case arises from the dismissal, under Fed. R. Civ. P. 56, of a complaint in which Luks alleged that Baxter discriminated against him on the basis of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* Luks' claims stemmed from the termination of his employment at Baxter where he worked as a Senior Business Systems Consultant. According to Luks, Baxter's Vice President of Architecture, Technology and Planning, John Goode, had a "plan" to get rid of the three oldest employees in the department, including Luks. Luks further asserted that the performance evaluation and corrective action plan that led to his termination were inaccurate and unfair. Finally, Luks alleged that his termination from employment was based not his poor performance, but on his age. At the time of his termination, Luks was fifty-two (52) years old, John

Goode was forty-four (44) years old, and Carol Kazl, Luks' manager who evaluated Luks' performance and terminated his employment, was forty-seven (47) years old.

Baxter moved for summary judgment on Luks' claims, which was granted by the United States District Court for the Northern District of Illinois on August 29, 2005. Luks appealed the decision and, after the parties fully briefed and orally argued the appeal, the Seventh Circuit affirmed the lower court's decision on November 3, 2006. Luks filed his petition for writ of certiorari on February 6, 2007.

REASONS FOR DENYING PETITION

The "Questions Presented" by Luks in his petition are well settled issues of law in the Seventh Circuit and other circuits: (1) Under the Age Discrimination in Employment Act, is an admission from the employer that the adverse employment action is based on age required to support the inference of age discrimination under both the direct and the circumstantial methods of proof in order for the employee to survive summary judgment?; (2) Must a court ruling on an employer's motion for summary judgment under Fed. R. Civ. P. 56 in an age discrimination case view the evidence in the light most favorable to the employee? and (3) Under the Age Discrimination in Employment Act, is evidence that each and every individual involved in the decision-making process had a discriminatory motive required to prove that the employer's reason for the adverse employment action was a pretext for discrimination? The questions presented by Luks are

not unsettled or unique in any way. Thus, there is no basis for review by this Court.

Further, to the extent that Luks really claims that the Seventh Circuit misapplied the above well-established legal principles, Rule 10 of the Supreme Court of the United States specifically states that a petition for writ of certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. Rule 10. This case certainly is not a "rare" one warranting review by this Court.

Luks' petition indisputably mischaracterizes the legal rulings below. First, the Seventh Circuit did not hold that an actual admission of discrimination is necessary in order to survive summary judgment in a direct or circumstantial case of discrimination. Rather, as discussed *infra* in part I, the Seventh Circuit reviewed all of Luks' evidence of alleged discrimination and properly concluded that it did not support the *inference* that Luks was discharged because of his age.

Second, the Seventh Circuit continually gave Luks the benefit of the doubt by viewing the evidence in a light most favorable to him. In fact, as discussed *infra* in part II, the Seventh Circuit's decision is replete with statements such as "we may assume for the sake of argument," "the factfinder arguably could infer," "we accept Luks' construction as accurate for the present purposes," and the evidence "could be seen," clearly showing that the Court was carefully considering all of Luks' evidence as he, not Baxter, presented it.

Finally, the Seventh Circuit did not apply an incorrect pretext standard as it relates to the decision-making process. Rather, as discussed *infra* in part II, the Seventh Circuit properly focused on whether John Goode's alleged discriminatory animus played *any* role in the events culminating in Luks' termination. In sum, Luks presents no issue that requires review by this Court. Instead, he simply attempts to reargue his case, while misconstruing the holding below. Accordingly, Luks' petition for writ of certiorari should be denied.

I. THE SEVENTH CIRCUIT DID NOT REQUIRE AN ADMISSION FROM BAXTER THAT LUKS' TERMINATION WAS BASED ON AGE

The Seventh Circuit properly recognized that "direct" proof of discrimination is "not limited to near-admissions by the employer that its decisions were based on a proscribed criterion (*e.g.*, 'You're too old to work here.'), but also includes circumstantial evidence which suggests discrimination albeit through a longer chain of inferences" (Pet. App. at 6a). Likewise, the Seventh Circuit examined the "subset of circumstantial evidence" in determining whether Luks could overcome summary judgment under the "indirect" method of proof (*Id.*). In applying these well-established standards, the Seventh Circuit considered all of Luks' evidence together to determine whether he could establish age discrimination through either means. In the end, the Seventh Circuit agreed with the district court that Luks could not.

Luks attacks the Seventh Circuit's decision by minimizing (and essentially ignoring) the most

important part of his burden of proof – that his termination was *because of* his age. As the Seventh Circuit correctly concluded, Luks has presented no evidence that his termination from employment was because of his age, rather than his manager's honestly-held belief that his performance was significantly deficient in a number of areas (*Id.* at 6a). Thus, although Luks may have sufficient evidence (when viewed in a light most favorable to him) that John Goode had a "plan" to get rid of Larry Helsith, Glenn Jurmann and himself (the "three oldest" employees in the department), Luks presented no evidence that "this mosaic of evidence supports the inference that Goode's apparent wish to terminate these three employees was motivated by their age" (*Id.* at 9a).

This is true even in light of the alleged "stray remarks" made by Goode before Luks' termination. In dismissing those comments as insufficient to create an inference of age discrimination, the Seventh Circuit reviewed each alleged comment to determine whether the remarks were in any way related to the termination decision at issue in this case. In applying well-established precedent, the Seventh Circuit properly recognized that the "good old boys" and "higher energy" comments were simply not evidence of age discrimination (Pet. App. at 12a). *See Lindsey v. Baxter Healthcare Corp.*, 962 F.2d 586, 588 (7th Cir. 1992) ("No weight can be attached to an overheard comment that Baxter does not like to promote 'good old boys,' since any competent user of the English (or rather the American) language knows that to be a good old boy one need not be old, or for that matter good."); *Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106, 1113 (7th Cir.

1998) (stated preference for "new blood," individuals with "a lot of energy" and who are a "quick study" does not reflect an age bias and, in any event, was not linked to the employment decision at issue).

Further, the Seventh Circuit agreed with the lower court that the "old timers" comment constituted inadmissible hearsay — a problem Luks "made no effort to surmount" (Pet. App. at 12a).[1] Finally, the Seventh Circuit properly concluded that Goode's "old guy" joke, although made around the time of Luks' termination, was not linked in any way to the termination decision (*Id.* at 12a). Indeed, Luks does not and cannot dispute that his direct supervisor, Carol Kazl, assessed his performance, drafted the performance review and performance plan, and made the decision to terminate Luks' employment for his failure to meet the requirements of the plan. Luks offers no evidence in support of his belief that his performance plan was "fabricated" by Kazl or that Baxter "never intended him to survive the plan."

In the end, Luks' arguments in his petition are no more compelling now than they were in the district court or in the Seventh Circuit. Because Luks failed to establish that Goode's alleged dislike of older workers played *any role* in his termination from employment, the Seventh Circuit correctly concluded that no reasonable jury could infer that Luks was terminated *because of* his age. *See Cerutti v. BASF Corp.*, 349 F.3d 1055, 1060, 1063 (7th Cir. 2003); *Fuka v. Thomson Consumer Elecs.*, 82 F.3d 1397, 1403 (7th Cir. 1996); *McCarthy v. Kemper Life Ins. Co.*, 924

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[1] Similarly, in his petition, Luks makes no effort to argue why the "old timers" comment does not constitute inadmissible hearsay.

F.2d 683, 686-87 (7th Cir. 1991). Luks has not established that the Seventh Circuit misapplied the controlling case law, "repealed our civil rights laws" or that there is any other legitimate reason for this Court to review the Seventh Circuit's well-reasoned decision. Accordingly, his petition for writ of certiorari should be denied.

II. THE SEVENTH CIRCUIT DID NOT APPLY THE WRONG BURDENS IN ANALYZING THE FACTS OR APPLYING THE APPLICABLE PRETEXT STANDARDS

In his petition, Luks also asserts that the Seventh Circuit applied the wrong burden of proof by not viewing the facts in a light most favorable to him. To the contrary, statements such as "in Luks' view," "as Luks interprets them," "Luks contends" and "to Luks' mind" demonstrate that the Seventh Circuit reviewed the facts as Luks, not Baxter, presented them. The Seventh Circuit, like the district court, explicitly recognized this obligation, stating at the outset: "We are, of course, obliged to construe the admissible evidence in Luks' favor in deciding whether the record presents a question of material fact that precludes summary judgment in Baxter's favor" (Pet. App. at 6a). Further confirmation of the Seventh Circuit's review of the evidence in favor of Luks is embodied in the following statement:

> According to Baxter, Goode made those remarks not during a discussion of Helsith and Jurmann, but rather in reference to individuals on a technical leadership team who had been with the company for long

> periods of time. But we accept Luks' construction as accurate for present purposes.

(Pet. App. at 11a). There is no question that the Seventh Circuit gave Luks the benefit of the doubt by resolving all material factual disputes in his favor.

Luks further suggests that the Seventh Circuit erroneously applied applicable pretext standards by requiring him to establish that everyone involved in the decision-making process harbored a discriminatory animus. Luks misconstrues the Seventh Circuit's decision. In reviewing the termination decision, the Seventh Circuit properly focused on "not whether the criticisms of his performance were right or wrong but whether his supervisor honestly believed them" (Pet. App. at 14a). *See Gusewelle v. City of Wood River*, 374 F.3d 569, 576 (7th Cir. 2004). Thus, although Luks disagreed with the criticisms of his performance and Kazl and Goode were unwilling to discuss the disagreement, "it does not show that Kazl was untruthful in her negative evaluation of Luks" (Pet. App. at 14a). Rather, at most it establishes only that Kazl "may have been mistaken in her assessment and that both she and Goode were bull-headed in their refusal to consider that possibility" (*Id.*).

Luks also argues that the Seventh Circuit erred by ignoring certain evidence of pretext. The record does not support Luks' assertion. A simple review of the district court's decision and the Seventh Circuit's decision reveals that both courts reviewed all of the evidence presented by Luks and ultimately determined that it did not evidence age

discrimination. The mere fact that each piece of evidence was not analyzed ad nauseam certainly does not establish that the underlying decisions were erroneous in any way. For example, Luks offers as evidence of pretext the fact that Goode "directed" Kazl to place him on a performance plan, much like Goode "directed" Cynthia Overby to place Helsith and Jurmann on performance plans. However, Luks ignores one critical distinguishing fact between the two alleged "directives" —unlike Overby, Kazl herself observed significant problems with Luks' performance and, therefore, drafted a performance plan to address and remedy his performance deficiencies. The fact that Kazl (who had never placed an employee on a performance plan) consulted Goode and Goode "coached" her through the process, does not in any way establish that Goode directed Kazl to "fabricate" a plan or that Kazl did not honestly believe Luks' performance was deficient. The same is true with the simple fact that Goode may have discouraged Luks from discussing his performance issues with human resources because he and Kazl believed that Luks could improve his performance and meet the objectives of his performance plan. Unlike the facts in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), Goode did not recommend, urge or otherwise initiate Luks' termination (Pet. App. at 16a) — Kazl did, with only Goode's final blessing. As the Seventh Circuit properly concluded, "there is no evidence that Kazl was a party to [John Goode's] plan and concocted false criticisms of Luks' work in an effort to carry the plan out" (*Id.*).

Finally, the Seventh Circuit properly considered Luks' last-ditch effort of establishing pretext through

alleged comparables Nathan Habeck and Terri Stevens. Consistent with applicable case law, the Seventh Circuit found that the evidence was insufficient to establish pretext for two reasons. First, Baxter could legitimately hold Luks to a higher standard of conduct given his position of leadership in the department (Pet. App. at 14a). *See Peele v. Country Mut. Ins. Co.*, 288 F.3d 319, 330 (7th Cir. 2002) (in order to be similarly situated, employees must be subject to the same standards and engage in similar conduct "without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them."). Second, because Luks only called into question some, but not all, of Kazl's criticisms of him, "the evidence does not support the inference that the overall basis for Luks' discharge was pretextual" (Pet. App. at 14a). *See Wolf v. Bus (America) Inc.*, 77 F.3d 914, 920 (7th Cir. 1996). In the end, contrary to Luks' petition, the Seventh Circuit did not weigh facts in favor of Baxter. It considered all of Luks' alleged evidence of pretext and concluded that it was insufficient to create a genuine issue of material fact.

CONCLUSION

Luks clearly has not met his burden under Rule 10 to demonstrate a "compelling reason" to grant his petition for writ of certiorari. Sup. Ct. Rule 10. The dismissal of Luks' claims was properly affirmed by the Seventh Circuit, after the appellate court appropriately applied the well established law of the circuit and this Court. There are simply no issues which warrant this Court's review or involvement. Accordingly, Baxter respectfully requests that the petition for writ of certiorari be denied.

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IN THE

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PETER LUKS,

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BAXTER HEALTHCARE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BAXTER'S "STATEMENT" CONTAINS INACCURATE AND IRRELEVANT FACTS

Baxter states that '*[a]ccording to Luks* . . . John Goode had a 'plan' to get rid of the three oldest employees in the department, including Luks." Opp. Brief at p. 1. (emphasis added). However, the Seventh Circuit *conceded* that:

> We may assume for the sake of argument that these bits of evidence, individually and collectively, are consistent with there being a wish and a plan by Goode to get rid of Luks along with Helsith and Jurmann irrespective of their actual performance. The factfinder arguably could infer from the testimony of Overby, as Helsith's and Jurmann's immediate supervisor, that they were being targeted for termination for reasons unrelated to their performance. . . . The documents, which mention Luks as well as Helsith and Jurmann and which appear to have predated the implementation of any of the performance plans, likewise could be seen as being consistent with a preconceived plan to get rid of all three employees. App. 10a.

Baxter further states that Luks asserts that the performance evaluation and corrective action plan that lead to his termination were "inaccurate and unfair." Opp. Brief at p. 1. What Luks, in fact, contends, is that in light of Goode's "plan" and his directives to Kazl, the performance issues and the plan were fabricated to form a pretextual basis for his termination.

Finally, Baxter's reference to Goode's and Kazl's ages is misleading. First, Luks is significantly older than both Kazl and Goode. More importantly, any presumption that decision-makers over 40 years old would not discriminate against other members of the protected category has been unequivocally rebutted by Goode's acknowledged "plan" to terminate the oldest members of his department. *See, e.g., Wathen v. Allison Engine Company*, 102 F.Supp 2d 1015, 1025 (S.D. Ind. 2000).

REASONS FOR GRANTING THE PETITION

Luks agrees that the "Questions Presented" by him involve well settled issues of law. However, the Seventh Circuit wholly deviated from these well settled principals such that review by this Court is warranted, just as it was in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Significantly, Baxter makes only a passing reference to *Reeves*. Opp. Brief at p. 9. Baxter attempts to distinguish this case from *Reeves* based *solely* on the Seventh Circuit's erroneous conclusions that "Goode did not recommend, urge or otherwise initiate Luks' termination" and that "there is no evidence that Kazl was a party to [John Goode's] plan and concocted false criticisms of Luks' work in an effort to carry the plan out." Opp. Brief at p. 9. In reaching these conclusions, the Seventh Circuit was simply not weighing the evidence in the light most favorable to Luks.

The Seventh Circuit conceded that Goode targeted Luks, Helsith and Jurmann irrespective of their performance. Yet the Seventh Circuit and Baxter ignore evidence of *his directives to Overby to fabricate performance plans for Helsith and Jurmann, and Kazl's* ***admissions to Overby*** *that Goode gave her a similar directive and that she was not sure what "they" wanted.* It took Kazl *two months* to create the plan. Moreover, to the extent that the District Court and the Seventh Circuit relied on Kazl's own testimony to support

the conclusion that she acted "independently," let us not forget that Kazl is still employed by Baxter and Overby was actually terminated by Goode for expressing concerns about Goode's "directives" with regard to Helsith and Jurmann to Human Resources.

Even the Seventh Circuit acknowledges that Goode was involved in Kazl's decisions "at each step of [the] process" and that he "coached" her in the implementation of the performance plan. App. 12a, 13a.

Baxter simply cannot overcome the fact that the evidence clearly supports the inference that Goode was not only involved, but was the driving force, in the decisions leading to Luks' termination. If truly viewed in the light most favorable to Luks, this evidence is sufficient to create genuine issues of material fact as to whether Baxter's reason for terminating Luks is unworthy of credence. It is well settled that "[i]t is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves*, 530 U.S. at 146-147, citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).[1]

Significantly, Baxter's Brief in Opposition fails to address the fact that Luks, Helsith and Jurmann had absolutely *nothing* in common *other than* their age and the fact that they worked under Goode. It also fails to address the fact that Goode was indeed successful in his plan to get Luks, Helsith and Jurmann out of his department.

If Luks' circumstantial evidence of discrimination is insufficient to support the inference of age discrimination, it

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[1] In this regard, Baxter's focus on Goode's age-related comments in Section I of its Brief is a diversionary tactic. Luks' circumstantial evidence of pretext and Goode's age-related animus was sufficient without these comments to survive summary judgment.

is difficult to conceive what evidence, short of an admission by the employer of age-related animus, would be sufficient for a victim of age discrimination to survive summary judgment. This Court has instructed that ""the 'plaintiff [has] his day in court despite the unavailability of direct evidence.' "*Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), quoting *Loeb v. Textron*, 600 F.2d 1003, 1014 (1st Cir. 1979).

The Court must not sanction the Seventh Circuit's weighing of facts in favor of Baxter in direct contravention of Fed. R. Civ. P. 56. Nor should it sanction the court's abrogation of the circumstantial evidence standard. If this decision is permitted to stand, victims of age discrimination will truly have little or no recourse.

Luks and other victims of age discrimination are entitled to their day in court.

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of *Certiorari* should be granted, the decision of the Seventh Circuit reversed, and the case remanded to the district court for trial.

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